DOCKET

No. 07-1114 *** CAPITAL CASE ***

Title: Gary Bradford Cone, Petitioner

v.

Ricky Bell, Warden

Docketed: February 27, 2008

Lower Ct: United States Court of Appeals for the Sixth Circuit

Case Nos.: (99-5279)

Decision Date: June 19, 2007

Rehearing Denied: September 26, 2007

Questions Presented

---Date---	--------Proceedings and Orders----------
Dec 6 2007	Application (07A486) to extend the time to file a petition for a writ of certiorari from December 25, 2007 to February 23, 2008, submitted to Justice Stevens.
Dec 11 2007	Application (07A486) granted by Justice Stevens extending the time to file until February 23, 2008.
Feb 25 2008	Petition for a writ of certiorari filed. (Response due March 28, 2008)
Mar 27 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the petitioner.
Mar 28 2008	Brief amicus curiae of Veterans for America filed.
Mar 28 2008	Brief amicus curiae of Former Prosecutors filed.
Apr 2 2008	Order extending time to file response to petition to and including April 28, 2008.
May 6 2008	Order further extending time to file response to petition to and including May 14, 2008.
May 14 2008	Brief of respondent Ricky Bell, Warden in opposition filed.
May 20 2008	DISTRIBUTED for Conference of June 5, 2008.
May 22 2008	Reply of petitioner Gary Bradford Cone filed. (Distributed)
Jun 9 2008	DISTRIBUTED for Conference of June 12, 2008.
Jun 16 2008	DISTRIBUTED for Conference of June 19, 2008.
Jun 23 2008	Petition GRANTED.
Aug 6 2008	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 5, 2008.
Aug 6 2008	The time to file respondent's brief on the merits is extended to and including October 31, 2008.
Sep 5 2008	Joint appendix filed.
Sep 5 2008	Brief of petitioner Gary Bradford Cone filed.
Sep 8 2008	SET FOR ARGUMENT ON Tuesday, December 9, 2008.

Sep 8 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Sep 12 2008	CIRCULATED.
Sep 12 2008	Brief amici curiae of Former Prosecutors filed. (Distributed)
Sep 12 2008	Brief amicus curiae of Veterans for America filed. (Distributed)
Oct 3 2008	Record received from the U.S.C.A. for the 6th Circuit. (1 box - containing 1 binder)
Oct 31 2008	Brief of respondent Ricky Bell, Warden filed. (Distributed)
Nov 7 2008	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Nov 19 2008	Record received from the U.S.D.C. for the Western District of Tennessee. (3 boxes containing 18 volumes and 2 transcripts.)
Dec 1 2008	Reply of petitioner Gary Bradford Cone filed. (Distributed)
Dec 9 2008	Argued. For petitioner: Thomas C. Goldstein, Washington, D.C. For respondent: Jennifer L. Smith, Associate Deputy Attorney General, Nashville, Tenn.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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No. 07-__

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE – NO DATE OF EXECUTION SET

QUESTIONS PRESENTED

On state post-conviction review, the Tennessee courts refused to consider petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that the claim had already been "previously determined" in the state system. On federal habeas, a divided panel of the Sixth Circuit held that the state courts' ruling precluded consideration of the *Brady* claim. The court of appeals reasoned (in conflict with decisions of five other circuits) that the claim had been "procedurally defaulted." The court of appeals further reasoned (widening an existing four-to-two circuit split) that the state courts' ruling was unreviewable. Seven judges dissented from the denial of rehearing en banc.

The question presented is whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of *Brady v. Maryland*, which encompasses two subquestions:

1. Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts?

2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Bradford Cone respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the en banc court of appeals denying the petition for rehearing en banc (Pet. App. 1a-5a) is reported at 505 F.3d 610. The panel decision (Pet. App. 6a-47a) is reported at 492 F.3d 743. A prior ruling of the panel (Pet. App. 48a-85a) is reported at 243 F.3d 961. The memorandum order of the district court (Pet. App. 86a-132a) is unreported.

JURISDICTION

The opinion and judgment of the court of appeals was filed on June 19, 2007. The order denying petitioner's timely petition for rehearing en banc was entered on September 26, 2007. Justice Stevens granted an application to extend the time to file this petition until February 23, 2008, a Saturday. The petition was accordingly due on the next business day, February 25, 2008. *See* S. Ct. R. 30. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 2254 of Title 28 of the United States Code states in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

> granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT

In this case, the State suppressed substantial exculpatory evidence that went to the heart of the petitioner's defense both at trial and at the capital sentencing phase. Although pressed by petitioner at every opportunity, both the state courts and the Sixth Circuit have refused to consider that claim – but only for mistaken and inconsistent reasons that the State cannot and pointedly does not defend. The central question in this case is whether petitioner will ever have the opportunity to receive federal court review of this fundamental claim. The Sixth Circuit's denial of rehearing en banc over the dissenting votes of seven judges and the circuit conflicts created by its decision demonstrate the importance of the question and the necessity of this Court's review.

1. Petitioner is a Vietnam War veteran and recipient of the Bronze Star. Unfortunately, post-traumatic stress disorder, combined with drug abuse, led him to crime. In 1982, a Tennessee jury convicted petitioner of first-degree and felony murder, as well as other charges, arising from his robbery of a jewelry store and subsequent flight from police, which resulted

in the deaths of two individuals. At trial, petitioner did not deny that he had committed the charged acts. Instead, his whole defense was that he did not have the specific *mens rea* necessary for a conviction for capital murder, or that he at least should not be subject to a sentence of death, because his actions were the product of an amphetamine psychosis: post-traumatic stress disorder, combined with a debilitating drug addiction that had begun during the Vietnam War.

At trial, petitioner called three witnesses in support of his defense, including two expert clinicians. Dr. Matthew Jaremko, a clinical psychologist, testified that petitioner suffered from "a substance abuse disorder . . . that is superimposed upon a post-traumatic stress disorder." CA6 J.A. 34. Dr. Jonathan Lipman, a neuro-pharmacologist, testified that petitioner's drug abuse had become so serious that petitioner suffered from "chronic amphetamine psychosis." *Id.* at 53.

The State responded by attacking the premise that petitioner was a drug user at all, much less a drug addict. It maintained that petitioner's experts had relied only on petitioner's own assertions regarding his alleged drug use and aggressively attacked those assertions as "balony [*sic*]" (*id.* at 124). To attempt to establish that petitioner had no relevant drug problem, the State called several witnesses. The officer who processed petitioner upon his arrest – Ralph Roby – testified that he had seen no sign petitioner was a drug user. An FBI agent who interviewed petitioner after his capture – Eugene Flynn – testified that petitioner did not then act as if he were mentally ill or on drugs. A companion of petitioner – Ilene Blankman

– testified that she had seen no sign of petitioner using drugs. The jury convicted petitioner on all charges.

At sentencing, the State sought the death penalty on the basis of several aggravating circumstances. Petitioner's argument in mitigation mirrored the claim he made in the guilt phase – that he had committed the crimes while in the throes of an amphetamine psychosis. Petitioner's counsel referred the jury to the evidence previously presented and argued that petitioner committed the crimes while "under the influence of extreme mental or emotional disturbance." J.A., S. Ct. No. 01-400, *Cone v. Bell*, 2002 WL 32102936, at *24a. The jury found that aggravating factors outweighed mitigating factors, and sentenced petitioner to death.

The Tennessee Supreme Court affirmed the conviction and sentence on direct review. In so holding, the court underscored the significance of the evidentiary issue of petitioner's mental state to the case:

> The only defense interposed on his behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. Their testimony that he lacked mental capacity was based purely upon his personal

recitation to them of his history of military service and drug abuse.

State v. Cone, 665 S.W.2d 87, 90 (Tenn. 1984).

2. After the conclusion of direct review, petitioner filed a timely petition for state post-conviction relief. While his timely petition was pending before the trial court, he filed an amendment that included a brief argument that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding exculpatory evidence bearing directly on the disputed question of petitioner's mental state.

While the petition was pending, state law for the first time granted petitioner the right to review the district attorney's file in his case. *See Capital Case Resource Ctr. of Tenn. v. Woodall*, No. 01-A-019104CH00150, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992) (state public records law requires disclosure of police and prosecutorial files). The file revealed a wide array of exculpatory evidence suppressed by the State that bore directly on petitioner's defense and argument in mitigation. Other evidence would have impeached the state's witnesses. For example, directly contrary to Officer Roby's testimony that he saw no sign of petitioner's drug use, a series of police teletypes he authorized described petitioner as a "drug user" and "heavy drug user." Contrary to the testimony of Agent Flynn, police reports stated that, both during and after the robbery, petitioner looked "frenzied," "wild-eyed," and like a man on drugs. Contrary to the prosecution's attempt to paint Ms. Blankman as neutral or even a friend of petitioner, correspondence indicated that the State had aggressively courted her. *See generally infra* at 28-29 (further describing the evidence).

Petitioner promptly amended his state post-conviction application twice to set forth a more detailed and elaborate allegations raising the State's *Brady* violation. State law permitted those amendments because the basis for the claims had not previously been available to petitioner.[1]

The State responded that the state post-conviction court should not address petitioner's amended *Brady* claim because that claim had already been decided against petitioner. At that time, Tennessee law barred state courts from hearing a claim for post-conviction relief that had been "previously determined," in that it had been the subject of a ruling on the merits "after a full and fair hearing" on direct review or in earlier state post-conviction proceedings. Tenn. Code Ann. §§ 40-30-111 to 30-112 (1990) (repealed).

In asserting that the *Brady* claim had been previously determined, the State did not point to any disposition of the *Brady* claims arising from the prosecutorial file, but instead relied on an earlier state supreme court ruling that addressed the distinct question whether the State had violated a state procedural rule

---

[1] According to state law at the time, a ground for post-conviction relief that had not previously been presented was only forgone if the petitioner "knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground *could have been* presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990) (repealed) (emphasis added). The Tennessee Supreme Court explained that "the waiver provision cannot logically or legally 'apply to a defense [or grounds for relief] . . . which did not exist and could not have been asserted by the most diligent counsel at the [prior] hearing.'" *Swanson v. State*, 749 S.W.2d 731, 735 (Tenn. 1988) (bracketed alterations made in *Swanson*).

by not disclosing witness statements prior to cross-examination. Resp. to Pet. for Post-Conv. Rel. at 2, *Cone v. State*, No. P-06874 (Tenn. Crim. Ct. Aug. 12, 1993). Notwithstanding that the alleged prior ruling did not involve *Brady* and concerned entirely different evidence, the state court denied petitioner's application, summarily concluding that his *Brady* claims (as well as other claims) could not be further considered because they had been "heretofore determined and denied." *Cone v. State*, P-06874, slip op. at 6 (Tenn. Crim. Ct. Dec. 16, 1993).

The state court of appeals affirmed, summarily concluding that the *Brady* claim was "previously determined either on direct appeal or in the appellant's first petition." *Cone v. State*, 927 S.W.2d 579, 580-81 (Tenn. Crim. App. 1995). The state supreme court denied review.

3. Petitioner timely sought federal habeas relief. At the outset, the district court ordered the FBI to release any files relevant to petitioner's case. Those files included still further evidence that supported petitioner's defense at both the guilt and sentencing phases and impeached the State's witnesses: a series of FBI bulletins, authorized by prosecution witness Agent Flynn, that identified petitioner as a drug user, and a notice reporting that petitioner had been caught with amphetamines while in prison.

Petitioner's federal habeas petition reiterated his *Brady* claim arising from the evidence contained in the district attorney's files, as well as evidence newly uncovered in the FBI files.

In response, the State abandoned its previous argument. It no longer defended the state habeas court's ruling that petitioner's claim had been raised and previously determined in earlier proceedings. Instead, the State argued that the claim had actually been waived, and attempted to couch the state court ruling in those terms. In so arguing, the State directed the district court *not* to the state court of appeals' discussion of the paragraphs of petitioner's state post-conviction application addressing his *Brady* claim and its supposed prior determination, but instead to that court's general statement that "'all claims raised in his second petition for post-conviction relief *which had not been previously determined*'" were waived. CA6 J.A. 645-46 (emphasis added).

The district court accepted that argument, concluding that the State had rejected the *Brady* claim as "waived and that decision was affirmed on appeal." Pet. App. 102a. The district court also characterized petitioner's initial *Brady* claim as composed of only "conclusory assertions." *Id.* at 112a. But the district court rested that conclusion entirely on petitioner's initial, brief invocation of *Brady*, ignoring the later *amended Brady* claim stated by petitioner that contained significant details.

4. The court of appeals affirmed on other grounds. Characterizing the issue as "a difficult question," Pet. App. 57a, the court held that petitioner's *Brady* claim had been denied on an "'independent and adequate' state ground" based on "the state court's finding that Cone's claims were previously determined or waived," *id.* at 59a. In so holding, the panel ruled that the federal courts were powerless to determine

whether the state court had erred in holding that petitioner's claim was previously determined, reasoning that "we will not review a claim that has been determined under an independent and adequate state ground." *Id.* at 60a.

The court of appeals, however, granted relief on ineffective assistance of counsel grounds. This Court reversed. 535 U.S. 685 (2002). On remand, the court of appeals held that the State had employed an unconstitutional aggravating factor. This Court again reversed. 543 U.S. 447 (2005).

5. a. On remand, the court of appeals again addressed petitioner's *Brady* claim. The State did not defend the panel's prior conclusion that the state courts had deemed the claims previously determined. Instead, it continued to argue that the claims had never been properly presented to the state courts, and that petitioner had not identified "any justifiable cause for his failure to raise the . . . claims in a timely manner in state court." State's 2d Supp. Br. at 9, *Cone v. Bell*, No. 99-5279 (6th Cir. Mar. 11, 2005).

The court of appeals rejected the State's argument. Instead, a divided panel held that petitioner was barred as a matter of law from securing federal habeas relief because the state courts had found – however erroneously – that his *Brady* claims had been previously determined. "The Tennessee courts held that Cone's *Brady* claims were previously determined under [the state's procedural] rule, and [the panel's prior decision] found that Cone's claims were therefore procedurally defaulted." Pet. App. 22a. The state courts' "holding amounted to an independent and adequate state law ground *barring our considering* the

claims." *Id.* at 18a (emphasis added). The majority adhered to that ruling: "If the state court decides the petitioner's claims on an adequate and independent state ground, such as a state procedural rule, the petitioner's claims are considered procedurally defaulted and he is barred from seeking federal habeas relief." *Id.*; *see also id.* at 24a ("We again find that Cone's claims are procedurally defaulted and we reject Cone's request to reconsider his *Brady* claims.").

In passing, the court of appeals remarked that, in its view, the evidence was not *Brady* material because it "would not have overcome the overwhelming evidence of Cone's guilt" and in particular "the persuasive testimony that Cone was not under the influence of drugs" at the time of the crimes. Pet. App. 25a. The majority concluded that "[i]t would not have been news to the jurors[] that Cone was a 'drug user.'" *Id.*

b. Judge Merritt dissented. Pet. App. 31a-47a. As he explained, "[f]our courts – two state courts and two federal courts – have now misconstrued the record and declined to hear the merits after invoking the doctrine of 'procedural default.'" *Id.* at 32a-33a. He recognized that the state courts had erred in deeming petitioner's *Brady* claims to have been "previously determined." The state courts had genuinely "overlooked" that petitioner had in fact amended his post-conviction application to include a detailed *Brady* claim, and "the State trial court and Court of Appeals mistakenly asserted that the claims had been 'previously determined' at earlier stages of the review process." *Id.* at 32a. As a consequence, "no court, state or federal, has as yet reviewed the claim on the merits." *Id.*

Judge Merritt further characterized the State's argument that petitioner had never presented his *Brady* claim to the state courts "as a deliberate falsehood." Pet. App. 40a. The record, Judge Merritt explained in detail, demonstrates the contrary, as petitioner set forth the claim upon finally being provided the suppressed evidence. *Id.* at 40a-46a.

With respect to the majority's suggestion that the withheld evidence was not material, Judge Merritt found that determination to have been made "without any analysis of the record, or the *Brady* and mitigation lines of cases," and noted that the majority had "state[d] no basis for its conclusory statement." Pet. App. 46a. In his view, "[t]he undisclosed, withheld documents" were a persuasive answer to "the prosecutor's false, death knell" argument that petitioner had no evidence supporting his claim to have been acting while in a state of drug-induced psychosis. *Id.*

6. Petitioner sought rehearing en banc. The full court denied rehearing en banc over the dissent of seven judges. Pet. App. 1a-5a. The seven dissenters emphasized that the State had abandoned the rationale advanced by the state post-conviction courts for not hearing petitioner's *Brady* claims – namely, that those claims had been previously addressed and determined. Furthermore, respondent's assertion to the Sixth Circuit panel that petitioner had not presented his *Brady* claim to the state courts misstated the case's history by ignoring the detailed claim in his amended post-conviction application. Respondent acknowledged the error and pointedly advised the Sixth Circuit that "[t]he attorney who authored the State's principal

brief" was no longer employed by the State. Resp. Br. in Opp. to Rhg. 7 n.7.

The dissenters criticized the State for having switched gears, as the State was now arguing *yet another* position: that although petitioner had been entitled to raise his *Brady* claim before the state post-conviction court, even his amended post-conviction application had failed to do so in sufficient detail. The dissenters explained that, in their view, the State's newest position was as meritless as all its previous litigating positions had been, because it would impose a stringent pleading requirement that is contrary to "pleading rules in habeas cases under both Tennessee and federal law." *Id.* at 4a. "Cone's lawyers have tried diligently to comply only to be confronted by a prosecutorial smoke screen designed to obscure, confuse and mislead the court." *Id.*

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding rests on the dual propositions that (i) federal courts have no power to review a state court's ruling that a *Brady* claim was "previously determined," and (ii) that previous determination of a claim amounts to procedural default. Pet. App. 18a-19a. Those rulings warrant this Court's review. Indeed, the decision is so profoundly wrong that the State has not defended *either* of those rulings. That is for good reason: both holdings squarely conflict with this Court's precedents and decisions of other circuits, and each of those errors independently requires reversal.

First, the court of appeals' holding that previous determination of a claim in state court bars federal

court review gets habeas law exactly backwards. State-court exhaustion of a claim is generally a *prerequisite*, not a *barrier*, to the filing of a petition for a writ of habeas corpus in federal court. A defendant who has properly exhausted a federal claim does not somehow default that claim by unnecessarily raising it a second time before the state courts. Second, the law is well-established that a procedural-default finding does not preclude federal habeas review if the state court has not correctly or consistently applied its procedural rule. Here, even the most cursory examination would have revealed that petitioner's *Brady* claims had been ignored, not determined, in prior state court proceedings. Such a profound departure from foundational habeas corpus principles in a death penalty case, and in conflict with precedent of this Court and other courts of appeals, merits further review by this Court.

I. Certiorari Is Warranted To Resolve The Conflicts Between The Rulings Below And The Decisions Of This Court And Of Other Courts Of Appeals.

A. The Sixth Circuit's Ruling That A Claim "Previously Determined" By The State Courts Is "Procedurally Defaulted" For Purposes Of Federal Habeas Corpus Conflicts With The Rulings Of Other Courts.

The court of appeals' holding that petitioner's consistently presented but never resolved *Brady* claims had been procedurally defaulted stands federal habeas corpus law on its head, in conflict with the holdings of numerous other circuits.

A federal constitutional claim generally is not cognizable in federal habeas if the state courts have denied the claim on an adequate and independent state ground, absent a showing of cause and prejudice or that failure to consider the claim will produce a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Harris v. Reed*, 489 U.S. 255, 260-63 (1989). In this case, the Sixth Circuit denied petitioner's post-conviction application because the state courts ruled that the *Brady* claim had been "previously determined" and thus could not be reconsidered. 927 S.W.2d at 580-81 (Tenn. Crim. App. 1995); *Cone v. State*, P-06874, slip op. at 6 (Tenn. Crim. Ct. Dec. 16, 1993). On that basis, the court of appeals held that petitioner's federal habeas claims were "procedurally defaulted," and there thus was "an independent and adequate state law ground barring our considering the claims." Pet. App. 18a.

That was profoundly wrong. The state courts decided only that their previous determination of petitioner's *Brady* claims precluded reconsideration of those same claims by the state courts as a matter of state law.[2] That state-court ruling *opens* the door to federal habeas review; it does not close it. The previous determination of a federal claim establishes that the claim has been *exhausted* in the state system, not that it has been *defaulted*. The court of appeals' contrary view leads to the illogical conclusion that claims

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[2] As noted, the state courts had not, in fact, previously decided petitioner's *Brady* claims. The relevant point here, however, is that, even if those claims *had* been "previously determined," they were nonetheless not defaulted for purposes of federal habeas review.

presented twice to a state court system – claims that have been doubly exhausted – have somehow been forfeited just because state law (as it commonly does) bars reconsideration the second time around.

A procedural default occurs not when a claim has been presented twice to the state courts, but when "a habeas petitioner . . . has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 732. The procedural default rule is meant to "ensure[] that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Id.* Those concerns have no application when, as here, the state's procedural ruling rests upon a determination that the state courts *have* ruled on the merits of the claim.

Indeed, the court of appeals' decision cannot be reconciled with this Court's decision in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which specifically addressed the situation in which a "later state decision rests upon a prohibition against further state review – for example, . . . preventing the relitigation on state habeas of claims raised on direct appeal." *Id.* at 804 n.3. This Court concluded that, "[s]ince a later state decision based upon ineligibility for further state review *neither rests upon procedural default* nor lifts a pre-existing procedural default, *its effect upon the availability of federal habeas is nil.*" *Id.* (emphasis added).

The Sixth Circuit's ruling likewise conflicts with the decisions of five other courts of appeals. In *Brecheen v. Reynolds*, 41 F.3d 1343, 1358 (10th Cir. 1994), the Tenth Circuit hewed to *Ylst* and held that, "[i]f a state court addresses the merits of a particular federal

claim on direct appeal, . . . then its subsequent refusal to grant 'further' state review in an application for postconviction relief should be given no effect and does not constitute a procedural bar for purposes of federal habeas corpus review."

The Fifth Circuit has similarly followed *Ylst*, holding that "[a] state's refusal to listen to a habeas claim because it was decided on direct appeal does not impose a procedural bar to federal review of the constitutional issue." *Bennett v. Whitley*, 41 F.3d 1581, 1582 (5th Cir. 1994). Such a rule, the Fifth Circuit explained, "is not a procedural bar in the traditional sense," and thus "[i]t did not bar the district court from addressing the merits of" the petitioner's claims. *Id.* at 1583; *see also, e.g., Guillory v. Cain*, No. 05-30894, 2007 U.S. App. LEXIS 23613, at *5-6 (5th Cir. Oct. 8, 2007) (noting that the court had twice reversed a denial of habeas relief, when the district court mistakenly perceived a procedural default based on a rule against reconsideration).

Other circuits have also held that application of a rule against reconsideration does not amount to a procedural bar. The Ninth Circuit holds that a state finding of "[p]reclusion" based on prior adjudication "does not provide a basis for federal courts to apply a procedural bar." *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996); *see also Maxwell v. Sumner*, 673 F.2d 1031, 1034-35 (9th Cir. 1982) (when, under state law, claims were rejected on direct appeal and barred from reconsideration in state habeas, the petitioner is "not barred from seeking federal habeas relief" because the "claim had been considered and rejected on the merits on direct appeal").

The Second Circuit, in turn, expressly adopted *Maxwell*'s logic and holding in *Silverstein v. Henderson*, 706 F.2d 361 (2d Cir. 1983), holding that a state court ruling that a claim "was previously determined . . . does not constitute a finding of procedural default that would bar federal consideration." *Id.* at 368.

Relatedly, the Seventh Circuit has rejected procedural default when state law principles of *res judicata* barred reconsideration of prior decisions denying federal constitutional claims. *Davis v. Lambert*, 388 F.3d 1052, 1058 (7th Cir. 2004) ("'[W]e have repeatedly held that *res judicata* is not a bar to consideration of claims in a federal habeas action.'") (quoting *Moore v. Bryant*, 295 F.3d 771, 776 n.1 (7th Cir. 2002), and citing *Patrasso v. Nelson*, 121 F.3d 297, 301 (7th Cir. 1997)); *see also Porter v. Gramley*, 112 F.3d 1308, 1316 (7th Cir. 1997).

In short, had petitioner's habeas petition been filed within the Second, Fifth, Seventh, Ninth, or Tenth Circuits, his *Brady* claims would have been considered. The ability of federal courts to enforce the Constitution and to adjudicate properly preserved *Brady* claims in habeas corpus should not turn upon accidents of geography, particularly when the petitioner is under a sentence of death.

B. The Sixth Circuit's Ruling That A Federal Habeas Court Cannot Determine The Correctness Of A State Court's Ruling That A Claim Has Been Procedurally Defaulted Conflicts With Decisions Of This Court And Other Courts Of Appeals.

In addition to applying a rule of procedural default that has been rejected by numerous other courts of appeals, the Sixth Circuit erred in holding, contrary to decisions of this and other courts, that the district court lacked the power to examine the state courts' application of a procedural bar rule.

1. The Sixth Circuit's refusal to look behind the Tennessee courts' assertion of a procedural bar to review – the claim of prior determination – cannot be reconciled with *Coleman v. Thompson*, *supra*. In *Coleman*, this Court held that "federal habeas courts must *ascertain for themselves* if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds." 501 U.S. at 736 (emphasis added). This means that, just as this Court would do on direct review of a state-court criminal judgment, a federal habeas court must examine for itself "'whether the asserted non-federal ground independently and *adequately* supports the [state court] judgment.'" *Id.* (quoting *Michigan v. Long*, 463 U.S. 1032, 1038 (1983)) (emphasis added). A state appellate court's decision "to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court" is not an adequate state-law basis for denying review. *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam).

The federal courts' obligation to consider for themselves whether a rule of procedural bar was properly invoked is reflected in the settled principle that only firmly established and consistently applied procedural rules will result in bar. For example, in *Ford v. Georgia*, 498 U.S. 411 (1991), the state courts applied "a sensible rule" that "any *Batson* claim [must] be

raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths." *Id.* at 422. The state court furthermore deemed that requirement "to be a 'valid state procedural bar' to [the] petitioner's claim." *Id.* This Court, however, looked behind the state court's finding of default and rejected it, concluding that the state's procedural requirement was not firmly established at the time the petitioner had been tried. *Id.* at 425.

Thus, a state court's mere invocation of a procedural barrier to review does not tie the federal court's hands. Whether a rule is a genuinely "adequate" or "independent" ground for decision is a question of federal law for federal courts to determine. A rule that, as here, was misapplied to an inapplicable context presents no more of a barrier to federal rule than an inconsistently applied state rule.

2. The Sixth Circuit's ruling deepens a conflict in the circuits. The Fourth Circuit, like the court of appeals here, has held that a state court's finding of a procedural default that merely purports to invoke an independent and adequate state ground is binding on a federal court. *See Burket v. Angelone*, 208 F.3d 172, 184 (4th Cir. 2000); *Fisher v. Angelone*, 163 F.3d 835, 844, 854 n.11 (4th Cir. 1998); *Williams v. French*, 146 F.3d 203, 209 (4th Cir. 1998); *Ivey v. Catoe*, 36 Fed. Appx. 718, 726 (4th Cir. 2002); *Strickler v. Pruett*, No. 97-29, 1998 U.S. App. LEXIS 12805, at *33-34 (4th Cir. July 17, 1998) (per curiam); *Barnes v. Thompson*, 58 F.3d 971, 974 n.2 (4th Cir. 1995). The Fifth Circuit

adopted the holding of *Barnes* in *Smith v. Johnson*, 216 F.3d 521 (5th Cir. 2000) (per curiam).[3]

But four courts of appeals have held the opposite. In the closely analogous case of *Scott v. Mullin*, 303 F.3d 1222 (2002), the Tenth Circuit reached the merits of the petitioner's *Brady* claim, notwithstanding the state court's determination that the claim had been waived. The Tenth Circuit concluded that the waiver holding was erroneous because the petitioner had not known of the *Brady* material at the time of his direct appeal and the state had thus erred, under state law, in not finding cause for failing to raise the claim previously. *Id.* at 1229-30.

Similarly, in *Williams v. Lane*, 826 F.2d 654 (1987), the Seventh Circuit concluded that a state court procedural ruling does not constitute an "independent and adequate state procedural ground" barring federal review when "the [state] court chooses to ignore the fact that the petitioner has fully complied with the state's articulated procedural rules and simply deems the petitioner's claim waived." *Id.* at 660; *see also id.* ("It is clear from the record that petitioner complied with" Illinois' requirement that defendants preserve claims for appeal by making timely objections to them at the trial level.).[4]

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[3] In two unpublished decisions, the Sixth Circuit has applied the Fourth Circuit's decision in *Barnes*. *See Cooey v. Coyle*, No. 98-3050, 2000 U.S. App. LEXIS 38700, at *63-*64 (6th Cir. Oct. 12, 2000) (citing *Taqwiim v. Johnson*, No. 99-3425, 2000 U.S. App. LEXIS 22254, at *10-*11 (6th Cir. Aug. 22, 2000)).

[4] The First Circuit has cited the *Williams* rule with approval in considering the merits of the state court's finding of default. *Gilday v. Callahan*, 59 F.3d 257, 274 (1995).

Eleventh Circuit law is in accord. That court has held that, when a state court's procedural default ruling was based on a factual finding, that factual finding is subject to review (albeit deferential review) by the federal habeas court. *Francois v. Wainwright*, 741 F.2d 1275, 1280 (1984); *see also Cooper v. Wainwright*, 807 F.2d 881, 885-88 (11th Cir. 1986) (holding that, although the state supreme court had ruled the petitioner's constitutional claim barred for not having been raised on direct appeal, federal review of the claim was nevertheless appropriate, because the record demonstrated that the claim had in fact been addressed on appeal).

Relying on *Williams* and *Francois*, the Second Circuit has held that the federal habeas court may inquire whether there is a "fair or substantial basis" for the state court's finding of a procedural default. *Garcia v. Lewis*, 188 F.3d 71 (1999).

There is, in short, substantial inconsistency in the decisions of the federal courts of appeals concerning whether or not habeas courts should examine the merits of a state court's application of a procedural bar rule. Only this Court's review can bring the uniformity to federal habeas corpus law that is needed to protect the interests both of petitioners and the States.

Moreover, that divergence in court of appeals' law had a material impact on the outcome of this case. Had the Sixth Circuit considered the adequacy of the Tennessee courts' determination that petitioner's *Brady* claims had been procedurally defaulted, the erroneousness of the decision would have been obvious. Indeed, the basis on which the state courts ruled is so facially incorrect that the State notably does not de-

fend it. The state courts simply could not have previously decided a *Brady* claim that did not exist until *after* the state courts' prior rulings, when petitioner received access to the district attorney's files.

C. Petitioner's *Brady* Claims Have Been Properly Presented And Preserved.

In federal court, the State abandoned its original argument that petitioner's *Brady* claim was procedurally defaulted and argued, instead, that petitioner had waived the claim by not raising it in the state courts. That argument is not only wrong, but is wholly irreconcilable with the state courts' ruling that the claim was barred *because it had been previously raised and determined.* Notably, the Sixth Circuit found no merit in the State's assertion of waiver, but instead considered itself bound to accept rotely the state courts' mistaken and undefended conclusion that petitioner's *Brady* claim was procedurally defaulted because it had been "previously determined" in state court. Pet. App. 18a. A prisoner facing death should not have substantial constitutional claims that have been timely pressed at every opportunity completely ignored by the courts because of a state-induced error that the State not only refuses to defend, but in fact defies by its flatly contradictory, *post hoc* rationale. The interests at stake are simply too critical to be whipsawed between uncontested and undefended state-induced error and an irreconcilably contradictory *post hoc* rationale.

The State's waiver argument, moreover, is meritless for four reasons. First, the original petition asserted a *Brady* violation and, as soon as the State granted petitioner access to the district attorney's files,

he expeditiously amended his post-conviction petition to add detailed and precise *Brady* claims demonstrating that exculpatory evidence critical to his defense had been withheld. *See supra* at 5-6.

That amendment was timely because the basis for his amended claims had not previously been available to him, and notably no state court has ruled otherwise. Tennessee law at the time provided that "[a] ground for relief is 'waived' if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990) (repealed). In words that speak directly to petitioner's case, the Tennessee Supreme Court specifically held that "the waiver provision cannot logically or legally 'apply to a defense [or grounds for relief] . . . which did not exist and could not have been asserted by the most diligent counsel at the [prior] hearing.'" *Swanson v. State*, 749 S.W.2d 731, 735 (Tenn. 1988).

Second, even if the claims had somehow been waived despite their diligent presentation, petitioner established cause and prejudice. Petitioner had good cause for not raising the more developed *Brady* claims earlier because "the reason for his failure to develop facts in state court proceedings" – or, more precisely, in his pre-amended petition – "was the State's suppression of the relevant evidence." *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 282 (1999)). Until the State opened its file, only the State knew what evidence it had suppressed, and the State could not reasonably charge petitioner with arguing claims the entire basis for which

the State itself had unlawfully suppressed from him and from the courts.

Petitioner has also suffered significant prejudice because the suppressed evidence went to the heart of his defenses at both the guilt and sentencing phases and bore on the central contested issue in the case – whether petitioner could have been under a drug-induced psychosis at the time of the murders. Accordingly, "the suppressed evidence is 'material' for *Brady* purposes." *Id.* (citing *Strickler v. Greene, supra*); *see infra* Part II.[5]

Third and alternatively, even if the state courts had held that the *Brady* claims were waived (which they did not), that hypothesized ruling would not constitute an "independent and adequate" ground for refusing to consider his *Brady* claim, because there was no "'firmly established and regularly followed,'" *Ford v. Georgia*, 498 U.S. 411, 424 (1991), rule requiring the assertion of as-yet-unknown *Brady* claims. Quite the contrary, the Tennessee courts had repeatedly entertained *Brady* claims that materialized only after the State granted access to the district attorneys' files. *See State v. Johnson*, No. 01C01-9610-CR-00442, 1997

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[5] Further suppressed exculpatory evidence was first discovered in the FBI's files during federal habeas proceedings. The court of appeals held that petitioner had adequate cause for failing to raise the FBI-based claims in state court, but had failed to establish prejudice. That was wrong. If defense counsel had obtained the FBI records in a timely manner, they could have been used to impeach Agent Flynn, discredit the prosecution's case, and further establish that petitioner's drug use prevented him from having the specific intent required to be found guilty of first-degree murder. *See* CA6 J.A. 452 (asserting materiality of evidence). The evidence thus was material to the defense, which, under *Banks*, establishes prejudice.

WL 738586 (Tenn. Crim. App. Nov. 25, 1997); *O'Guinn v. State*, No. 02C01-9510-CC-00302, 1997 WL 210890 (Tenn. Crim. App. Apr. 29, 1997); *Wooden v. State*, 898 S.W.2d 752 (Tenn. Crim. App. 1994); *Workman v. State*, 868 S.W.2d 705 (Tenn. Crim. App. 1993).

Fourth, the Sixth Circuit's procedural bar ruling improperly placed the burden of proving the inadequacy of the state's procedural rule on petitioner. *See* Pet. App. 24a ("Cone has not shown that Tennessee did not consistently follow its procedural rules such that we should have disregarded Tennessee's finding that his *Brady* claims were previously determined."). That ruling directly implicates an acknowledged conflict in the circuits over which party – the State or the habeas petitioner – bears the burden of proof of the adequacy of a state procedural rule. *Compare Bennett v. Mueller*, 322 F.3d 573, 584-86 (9th Cir. 2003) (placing burden on State, specifically rejecting the Fifth Circuit's contrary approach, and following the Tenth Circuit's approach), *and Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999) (placing burden on State), *with Sones v. Hargett*, 61 F.3d 410, 416-17 (5th Cir. 1995) (placing burden on petitioner); *see also McNeill v. Polk*, 476 F.3d 206, 219-20 (4th Cir.) (King, J., concurring in part and concurring in the judgment) (recognizing conflict between the Ninth and Tenth Circuits and the Fifth Circuit), *cert. denied*, 128 S. Ct. 647 (2007).

In sum, there is no merit to the State's waiver argument. A person should not be executed, with substantial and timely presented constitutional claims left wholly unexamined, just because the state government

unabashedly asserts simultaneously that the claims both were and were not presented for review.

II. The Evidence Suppressed By The State Was Material To The Defense.

Although the Sixth Circuit expressly refused to consider the merits of petitioner's claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), it nonetheless opined in passing that the suppressed evidence would not have been material to the outcome of the case. That comment did not purport to consider or address the role the extensively suppressed evidence would have played in proving and corroborating petitioner's only defense to the charges and only argument in mitigation of the death penalty – *viz.*, that he was a drug abuser who was acting in the grip of a drug-induced psychosis. The panel's passing and unexamined observations thus do not diminish the imperative of this Court's review to resolve established conflicts in the circuits concerning petitioner's right to have his *Brady* claims *actually and fully* considered on the merits *one* time.

Moreover, should the Court wish to go further and reach the merits of petitioner's *Brady* claims, the record establishes that the State's suppression of material exculpatory evidence going to the heart of the defense violated the Constitution in a manner that undermines confidence in petitioner's conviction and death sentence.

A. Petitioner's sole defense was that he was acting under the influence of a drug-induced psychosis at the time of the crimes. Two experts offered detailed testimony of his mental incapacity. Dr. Matthew Ja-

remko, a clinical psychologist, testified that, based on his study, petitioner "was suffering from post-traumatic stress disorder as a result of his experiences in Viet Nam, and that upon this was superimposed a serious drug-abuse disorder." *State v. Cone*, 665 S.W.2d at 92; *see* CA6 J.A. 34. Dr. Jaremko testified further that "the post-traumatic stress disorder is the major cause for why he got involved in drugs." CA6 J.A. 34. "This post-traumatic stress disorder is a result of him being exposed to the trauma of combat and the continuing trauma that occurred after he came back as a Vietnam veteran from an unpopular war, in which he became disenfranchised from the society at large, causing him a great deal of personal stress, social maladjustment." *Id.* at 34-35. Dr. Jaremko also testified that, in his judgment, petitioner continued to suffer from Vietnam Veteran's Syndrome because he had never been treated for it. *Id.* at 37-38.

Dr. Jonathan Lipman, a neuro-pharmacologist, testified that, based on his study, petitioner "suffered from 'chronic amphetamine psychosis' as a result of serious drug abuse." *State v. Cone*, 665 S.W.2d at 92; CA6 J.A. 51-53. Dr. Lipman testified in detail about petitioner's substantial and protracted history of drug use, *see id.* at 41-65, and briefly about how his addiction related to his criminal history in that petitioner robbed pharmacies to support his addiction, *see, e.g.*, *id.* at 46.

The State's central response, which proved to be devastating to petitioner's case, was that petitioner's experts premised their testimony entirely on *post hoc* interviews with petitioner, rather than an evaluation of petitioner at the time of the crime. The State thus

called three rebuttal witnesses who "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question, and that he was experiencing severe and extreme symptoms of drug withdrawal after the crimes for which he was on trial." CA6 J.A. 93.

Characterizing the claim that petitioner had been using drugs as "balony [*sic*]," the State portrayed petitioner as a "drug seller," not a drug user. CA6 J.A. at 124. "How do we know if he used drugs? The only thing that we ever had that he used drugs, period, is the fact that those drugs were in the car and what he told people." *Id.* at 146. "He's a calm, cool, professional robber." *Id.* at 152. "No, you're not dealing with a crazy person, an insane man. A man, in their words, out of his mind. You're dealing, I submit to you, with a premeditated, cool, deliberate – and even cowardly, really – murderer." *Id.* at 162. The State persistently rejected the characterization of petitioner as having been "out of his mind" while committing his offenses, *e.g.*, *id.* at 152-54, invoking the contrary testimony of its three rebuttal witnesses, *e.g.*, *id.* at 157-58.

Petitioner's *Brady* claim establishes that the State suppressed precisely the evidence that would have validated his claim of amphetamine psychosis and that would have dramatically undercut the credibility of the prosecution's witnesses. The prosecution suppressed witness statements which indicated that the State knew about petitioner's heavy use of drugs around the time of the crimes. Robert McKinney stated that petitioner "'acted real weird' and appeared to be on drugs." Pet. App. 57a. Charles and Debbie Slaughter stated that petitioner "'looked wild eyed' the

day before the killings." *Id.* Sergeant Grieco (of Florida) described petitioner "as looking 'frenzied' and 'agitated' a few days after the killings." *Id.* at 57a-58a. Chief Daniels (of Arkansas) stated to authorities "that Cone 'was a heavy drug user.'" *Id.* at 58a.

The State also specifically suppressed evidence that would have answered Officer Roby's testimony that petitioner showed no outward signs of drug use. Roby had sent an All Points Bulletin warning "that Cone is not only a 'drug user,' but a 'heavy drug user,'" and Cone's sister "told Officer Roby that [petitioner] had a 'severe psychological problem' and 'needed to work on his drug problem.'" *Id.*

The State further withheld evidence that would have rebutted the testimony of FBI Agent Flynn, who had claimed that petitioner showed no signs of drug use when he was captured. These teletypes and letters – sent in August 1980 – and authorized by Agent Flynn say of Cone: "'Subject believed heavy drug user'"; "'Armed and extremely dangerous; drug user'"; and "'While in prison, Cone was caught in possession of 850 amphetamine pills which had been supplied to him . . . .'" CA6 J.A. 450-52.

Finally, the State suppressed evidence that would have undercut the credibility of Irene Blankman's testimony that she saw no evidence of drug use by petitioner. There was significant evidence that she had ongoing contacts with police, who sought to obtain testimony from her. Moreover, prosecutors' interview notes omit any mention that (as she later asserted in testimony) she had seen petitioner naked immediately before the crimes and had not seen needle marks on petitioner's body. CA6 J.A. 453, 1942-48.

B. The Sixth Circuit twice refused to consider the merits of petitioner's *Brady* claim on the ground that it had been defaulted. Both times, the panel opined briefly and without analysis that the evidence suppressed by the State did not undermine confidence in the outcome of the proceedings. *See* Pet. App. 59a-60a (first opinion; one sentence of explanation addressing only one withheld misstatement); *id.* at 25a (second opinion; summarily concluding that evidence was not material, given evidence of guilt). As Judge Merritt recognized in dissent, the majority made its observations "without any analysis of the record, or the *Brady* and mitigation lines of cases, and state[d] no basis for its conclusory statement." *Id.* at 46a. The terse discussion of the question of materiality thus contrasts starkly with the model for analyzing materiality and prejudice established by this Court in *Kyles v. Whitley*, 514 U.S. 419, 441-54 (1995), and *Banks v. Dretke*, 540 U.S. 668, 698-703 (2004).

There are four additional reasons why the court's passing reference to the merits poses no obstacle to this Court's resolution of the inter-circuit conflicts implicated by petitioner's claims.

First, the issue before this Court is whether petitioner's *Brady* claim merits full consideration by a federal habeas court. Whether, after such full consideration, petitioner prevails on the merits is an issue properly resolved on remand. Petitioner is entitled to his day in court even if, at the end of that day, he were to lose on the merits.[6]

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[6] Because the panel disavowed deciding the merits of petitioner's *Brady* claim, and discussed the question only in dictum, peti-

Second, the court of appeals' passing statements fundamentally misapprehended the basic legal question. The court suggested that the overwhelming evidence of petitioner's "guilt" rendered the suppressed evidence immaterial. Pet. App. 60a (first opinion); *id.* at 25a (second opinion). But petitioner *conceded* guilt in the sense that he acknowledged committing the charged acts. His defense was not that he did not commit the acts charged, but that he did so while suffering from an amphetamine psychosis that negated his mental capacity or that at least established a mitigating factor justifying the imposition of a life sentence rather than the death penalty. *See Strickler v. Greene*, 527 U.S. 263, 291-96 (1999) (determining *Brady* materiality by assessing the likelihood that proper disclosure of the withheld evidence would have resulted in a different verdict on guilt or prevented the imposition of the death penalty); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."); *compare United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The evidence suppressed in *Brady* would have been admissible only on the issue of punishment and not on the issue of guilt, and therefore could have affected only Brady's sentence and not his conviction.").

Third, the majority's conclusory assessment seemed to evaluate the suppressed evidence piecemeal.

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tioner's counsel have concluded that it would not be permissible to state that issue as a distinct Question Presented. This Court could of course reach the issue either by directing the parties to brief it or by recognizing that it is fairly encompassed by the question presented as described in the Petition.

See Pet. App. 59a-60a (referring only to a single witness statement as insufficient to undermine confidence in the verdict). Beyond that solitary reference to one piece of evidence in isolation, the court laid no more foundation for its blanket and conclusory assertion that the evidence was not material. *Id.* at 57a. The second panel opinion repeated the same errors, giving the back of the hand to petitioner's *Brady* claim based on a cursory consideration of only a fraction of the evidence looked at item-by-item. *Id.* at 25a-26a (stating that evidence regarding Roby and Flynn is not *Brady* material, then separately asserting that several witness statements also are not *Brady* material).

Because both of the court's statements were made without full consideration of the question, the court never addressed the combined effect of all the withheld evidence, as *Brady* requires. *See Kyles*, 514 U.S. at 436. And the court paid no heed at all to the evidence bearing on Ilene Blankman's credibility.

Fourth, the court of appeals' passing assessment of the materiality of the evidence suppressed by the State was, in any event, erroneous. For the reasons discussed *supra* at 26-29, that evidence was essential to petitioner's defense and argument in mitigation of the death sentence, and it "undermines confidence in the outcome" of the proceedings. *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). The evidence demonstrated directly and specifically petitioner's defense that he was acting under a psychosis induced by long-term drug abuse, impeached the State's witnesses, and strongly countered the prosecution's critical submission that all of petitioner's expert testimony

rested on petitioner's own belated and self-interested assertions regarding his drug use.

Moreover, the decision below conflicts with the decisions of other courts of appeals, which have consistently found suppressed evidence to be *Brady* material when the prosecution both withheld exculpatory evidence that could help prove the defense theory, and simultaneously argued a theory inconsistent with the withheld evidence. *See, e.g., Trammel v. McKune*, 485 F.3d 546, 552 (10th Cir. 2007) (prosecution's rebuttal "appeared accurate only because" of prosecution's failure to disclose all exculpatory evidence); *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003) (prosecution withheld evidence supporting defense's theory while denigrating that theory); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003) (prosecution misled jury by arguing witness was truthful while withholding extensive impeaching evidence); *Finley v. Johnson*, 243 F.3d 215, 221 (5th Cir. 2001) (prosecutor claimed defendant had "no defense" when prosecutor had evidence establishing a compelling defense); *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997) (prosecution withheld evidence of eyewitness who accused man other than defendant of the crime); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) (prosecution failed to disclose evidence that would have supported defendant's duress defense); *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993) (in combating duress defense, government persistently denied existence of a man who coerced defendant).

Beyond devastating petitioner's claim of amphetamine psychosis, the State's suppression of this critical primary evidence fundamentally undercut peti-

tioner's argument for mitigation of his death sentence. The court of appeals never considered how the jury would have weighed a mitigation argument that was backed by full evidentiary support against the State's proof of aggravating factors. The State's argument in favor of the death penalty sought to show that petitioner had a very high and culpable *mens rea* by contending that he knowingly created a great risk of death to two or more persons, murdered in a way that was especially "heinous, atrocious, or cruel," and murdered for the purpose of avoiding lawful arrest. Pet. App. 8a-9a. Had the jury heard more substantial and contemporary evidence of petitioner's mental incapacity shortly before and at the time of the crime, there cannot be confidence that the sentence would have been the same because the evidence precluded the high *mens rea* asserted by the government. If presented with the evidence suppressed by the State, the jury reasonably could have found that a mentally ill man in the clutches of amphetamine psychosis would have been unable to form the design necessary to support finding any of these factors. The only factor remaining would have been petitioner's conviction for robbery with a firearm ten years prior to trial. There can be no reasonable confidence that the jury would have sentenced petitioner to death on the basis of that factor alone, had substantial evidence supporting his case for mitigation not been suppressed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2008

APPENDIX

APPENDICES

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APPENDIX A

No. 99-5279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION,	)	
	)	
Respondent-Appellee.	)	

Filed: Sept. 26, 2007.

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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* Judge Gibbons recused herself from participation in this ruling.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

MERRITT, Circuit Judge, with whom MARTIN, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges, join, dissenting from the failure to grant an *en banc* rehearing. As my opinion dissenting from the panel's majority opinion points out, the State has successfully relied on procedural default on Cone's *Brady* claim throughout the state and federal judicial proceedings. It successfully claimed in the Tennessee courts that the *Brady* claim was "previously determined," not that it was "never raised." Then in federal court, the State made inconsistent claims that the *Brady* claim was both "previously determined" and "never raised." The majority of our panel has now held in two separate opinions that the claim is procedurally defaulted because "previously determined."

Now for the first time in its response to Cone's *en banc* petition, the State no longer asserts that the *Brady* claim was "previously determined" in state court. It recognizes now that the state courts have never considered the *Brady* claim on the merits. The State's response relies only on the argument that the claim is defaulted because it was "never raised" in state court.

This "never raised" argument is blatantly false. As outlined in my dissenting opinion, the record clearly demonstrates that on October 5, 1993, Cone's counsel filed an amendment to his second petition for post-conviction relief in the Criminal Court in Memphis stating in some detail that a constitutional violation occurred in Cone's trial "because the State

withheld exculpatory evidence which demonstrated that petitioner did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past, such evidence including . . . statements contained in official police reports . . . . Such evidence was highly exculpatory . . . . There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted petitioner and would not have sentenced him to death."

The State now argues that the issue was "never raised" because Cone did not recite and describe in detail each of the fourteen police documents and witness statements containing the exculpatory evidence of drug addiction withheld by the prosecution. It seeks to avoid a decision on the merits by insisting that Cone improperly pled his separate pieces of evidence as one claim instead of separate claims. The State reverses its previous position on procedural default and now attempts to slice up Cone's whole claim into little pieces. The State knows that it cannot defeat Cone's fundamental claim that the prosecution withheld exculpatory evidence of Cone's drug addiction and that Cone "did in fact suffer drug problems and/or drug withdrawal or psychosis" and that his evidence is "contained in official police reports."

By failing to reject the State's artificial effort to divide up the claim into fourteen little pieces and then conquer it through a phony procedural default defense, the *en banc* court is closing its eyes and allowing Cone to be executed without any effort to get to the merits or have the district court or a state court investigate the prosecution's concealment of strong exculpatory

evidence of drug addiction.

The State's divide-and-conquer tactic is inconsistent with pleading rules in habeas cases under both Tennessee and federal law. The Tennessee Supreme Court requires simply that the habeas petition state "a colorable claim . . . for post-conviction relief, that, if taken as true, in the light most favorable to petitioner would entitle petitioner to relief." *Arnold v. State of Tennessee,* 143 S.W.3d 784 (Tenn. 2004). The United States Supreme Court requires simply that "the substance of the federal habeas corpus claim must first be presented to the state courts." *Picard v. Connor,* 404 U.S. 270, 278, (1971); *Gray v. Netherland,* 518 U.S. 152, 163 (1996). Cone's lawyers have tried diligently to comply only to be confronted by a prosecutorial smoke screen designed to obscure, confuse and mislead the court.

Assuming arguendo that the State were right that the *Brady* claim was never raised in state court, the solution to the problem is not to dismiss the claim on grounds of procedural default. Procedural default is improper in this situation. Rather the federal courts should stay the proceedings on the *Brady* claim until the claim can be exhausted in state court. *Rhines v. Weber,* 544 U.S. 269, 278 (2005). As pointed out in my dissenting opinion, the state court ruled that the *Brady* claim was "previously determined" and refused to adjudicate it—a mistaken ruling directly inconsistent with the State's defense that the claim was never presented to the state courts. Our court's refusal to look at the case means that no court, state or federal, will ever have considered the claim on the merits seriously. The State's concealment of exculpatory evidence from the jury will result in

Cone's execution without proper review.

The long delay in considering and correcting this fatal error is due in part to the fact that the case in federal court has gone to the Supreme Court twice on other issues. This court twice issued the writ of habeas corpus, first on grounds of ineffective assistance of counsel, and then on grounds that the "heinous, atrocious and cruel" aggravator found by the jury was unconstitutionally vague. The Supreme Court reversed the panel decision twice leaving the *Brady* issue in limbo for many years. *See Cone v. Bell,* 243 F.3d 961 (6th Cir. 2001), *rev'd,* 535 U.S. 685 (2002) (ineffectiveassistance of counsel); *Cone v. Bell,* 359 F.3d 785 (6th Cir. 2004), *rev'd,* 543 U.S. 447 (2005) ("heinous, atrocious and cruel" aggravator).

Now, fourteen years after the *Brady* claim was initially raised in state court, we learn from the State Attorney General that the claim was never really raised. Having been twice reversed in the Supreme Court, we should not err again by failing to insure that the State's prosecutorial misconduct in concealing exculpatory evidence is considered on the merits. After fourteen years and two trips to the Supreme Court, surely the time has come to fully consider the *Brady* claim on the merits. There is no constitutional basis for disposing of this claim under the doctrine of procedural default.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0227p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE,
Petitioner-Appellant,

v.

No. 99-5279

RICKY BELL, Warden, Riverbend Maximum Security Institution,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 97-02312—Jon Phipps McCalla, District Judge.

Argued: November 2, 2006

Decided and Filed: June 19, 2007

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, Michael E. Moore, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

RYAN, J., delivered the opinion of the court, in which NORRIS, J., joined. MERRITT, J. (pp. 11-17), delivered a separate dissenting opinion.

OPINION

RYAN, Circuit Judge. In 1982, a Tennessee state court sentenced Gary Bradford Cone to death after convicting him of two counts of first degree murder, two counts of murder in the perpetration of a burglary, three counts of assault with intent to commit murder, and one count of robbery by use of deadly force. The jury found Cone had bludgeoned two elderly persons to death while hiding out after a robbery. The Tennessee courts upheld Cone's conviction and sentence on direct appeal and denied his petitions for post-conviction relief. Then, in 2000, Cone filed a petition for a writ of *habeas corpus* in federal district court, which, in due course, was denied. He appealed.

We have now heard Cone's appeal three times because the United States Supreme Court has twice reversed our decisions granting relief. This third time around, Cone raises a number of claims, none of which, in our judgment, has merit. Therefore, we will affirm the district court's original judgment denying Cone's petition.

I.

A.

The details of Cone's brutal crimes are not material to the issues we address in this appeal, but they are fully set forth in *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), *rev'd*, 535 U.S. 685 (2002) (*Cone I*). However, the details of this case's *procedural* history are material to the issues before us on this appeal and we recount them now.

At the time of Cone's conviction, under Tennessee law a jury could impose the death penalty only if it found that the government had proved, beyond a reasonable doubt, the existence of at least one of twelve statutory aggravating factors. Tenn. Code Ann. § 39-2404(i) (1981) (current version at Tenn. Code Ann. § 39-13-204(i) (2006)). In sentencing Cone to death, the jury found four aggravating factors: "[1] The defendant was previously convicted of one or more felonies, other than the present charge, which involve[d] the use or threat of violence to the person[; 2] The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder [('great risk of death' factor);] . . . [3] The murder was especially heinous, atrocious, or cruel [(HAC)] in that it involved

torture or depravity of mind [(HAC factor); and] [4] The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." *Id.*; *State v. Cone*, 665 S.W.2d 87, 94-95 (Tenn. 1984).

On direct appeal, the Tennessee Supreme Court found that the evidence did not support the jury's finding of the "great risk of death" factor. *Cone*, 665 S.W.2d at 95. However, the court found this error was "harmless beyond a reasonable doubt" because Cone's death sentence was supported by the other three aggravating factors found by the jury and by still another aggravating factor the jury did not find, but which the evidence supported; *viz.* that the murders were committed in perpetration of a burglary. *Id.* The court held that the death sentence was "not in any way disproportionate under all of the circumstances," and affirmed. *Id.* at 95-96. After Tennessee courts denied two post-conviction petitions, *Cone v. State*, 927 S.W.2d 579, 580 (Tenn. Crim. App. 1995), Cone filed a *habeas corpus* petition in federal district court under 28 U.S.C. § 2254, alleging numerous federal constitutional violations. As we have said, the federal district court denied Cone's petition on all claims and Cone appealed.

In 2001, after hearing Cone's first *habeas* appeal, we directed the district court to vacate the death sentence because Cone had been denied constitutionally guaranteed effective assistance of counsel at his sentencing hearing. *Cone*, 243 F.3d at 975-76. We also held that: (1) Cone's allegations that the prosecution had withheld evidence from him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), had been procedurally defaulted and that Cone had

not shown cause and prejudice to overcome this default; (2) even if these *Brady* claims were not procedurally defaulted, the allegedly withheld documents were not *Brady* material; and (3) statements made by the prosecutor during closing argument did not rise to the level of prosecutorial misconduct. *Cone*, 243 F.3d at 968-73. We specifically declined to address Cone's arguments that death by electrocution violates the Eight Amendment's prohibition on cruel and unusual punishment and that the Tennessee jury improperly considered the "great risk of death" and HAC aggravating factors in sentencing him to death. *Id.* at 975. The United States Supreme Court reversed our decision that the assistance provided by Cone's attorney did not meet constitutional minimums and remanded the case back to this court. *Cone I*, 535 U.S. at 702.

We heard Cone's second appeal, on remand, in 2004. We held that the statutorily defined HAC aggravating factor found by the sentencing jury was unconstitutionally vague. *Cone v. Bell*, 359 F.3d 785, 797-99 (6th Cir. 2004), *rev'd*, 543 U.S. 447 (2005) (*Cone II*). Since this error was not harmless, particularly in light of the jurors' erroneous reliance on the "great risk of death" aggravating factor, we granted Cone's petition for *habeas* relief, without addressing any of Cone's other claims. *Id.* at 799. The United States Supreme Court again reversed, holding that even if Tennessee's HAC aggravating factor was facially vague, the Tennessee Supreme Court is presumed to have "cure[d] this vagueness by applying a narrowing construction on direct appeal." *Cone II*, 543 U.S. at 459. The Supreme Court did not address any other issues and remanded, once again. *Id.* at 460.

B.

In this, his third appearance before us, Cone argues that several of his claims for relief remain unresolved. Without conceding any other claims, Cone's brief focuses on two main claims: (1) that the jury's improper consideration of the HAC and "great risk of death" aggravating factors at sentencing has not been cured and so he deserves a new sentencing hearing; and (2) that we should revisit our first decision's holding that Cone's *Brady* claims are procedurally defaulted, because the Supreme Court has since decided *Banks v. Dretke*, 540 U.S. 668 (2004). Cone also makes six additional claims: (3) death by electrocution violates the Eighth Amendment; (4) the prosecutor made false arguments to the jury; (5) Cone received ineffective assistance of counsel; (6) the judge gave misleading jury instructions; (7) women were systematically underrepresented as grand jury forepersons when Cone was indicted; and (8) he was denied the right to counsel during trial. We address each claim below.

II.

We review the district court's disposition of a petition for *habeas* relief *de novo*, but review the court's factual findings for clear error only. *Carter v. Bell*, 218 F.3d 581, 590 (6th Cir. 2000).

Our scope of review is also subject to the law of the case doctrine. Under that doctrine, when a court explicitly decides an issue of law, that decision should govern the same issue raised in subsequent stages of the same litigation. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Westside Mothers v. Olszewski*, 454

F.3d 532, 538 (6th Cir. 2006). In other words, when a court resolves an issue by a final decision, that decision binds future court decisions in the same litigation, even those by that same court. *Bowles v. Russell*, 432 F.3d 668, 676-77 (6th Cir. 2005), *cert. granted*, 127 S. Ct. 763 (2006). However, the doctrine does not preclude reconsideration of decided issues if the court finds "exceptional circumstances." *Westside Mothers*, 454 F.3d at 538 (citing *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997)). "Exceptional circumstances" include: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Id.*

We also note that when the Supreme Court remands to our court, "'whatever was before [the Supreme Court], and disposed of by its decree, is considered as finally settled'" and not in our power to rehear. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)).

III.

As a general proposition, we have authority to grant *habeas* relief on a claim adjudicated by a state court if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The "contrary to" clause means a federal court "may grant the writ if the state court arrives at a conclusion opposite to that

reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The "unreasonable application" clause means a federal court "may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. We make this determination by looking at whether the state court was objectively unreasonable in applying the federal law, not just whether the court was incorrect. *Id.* at 409.

Cone first claims that he is entitled to relief because the jury weighed two invalid aggravating factors—the HAC factor and the "great risk of death" factor—without any court performing a harmless error analysis or conducting a new sentencing hearing to consider Cone's mitigating evidence and valid aggravating factors.

In a so-called "weighing state" like Tennessee, in which the sentencer balances the aggravating and mitigating factors in making a death sentence determination, a sentence is arbitrary, and in violation of the Eighth Amendment, if the sentencer gives weight to an invalid aggravating factor, even if other valid factors have been found. *Richmond v. Lewis*, 506 U.S. 40, 46 (1992); *Stringer v. Black*, 503 U.S. 222, 230 (1992). However, the Supreme Court has held that a death sentence may still be upheld despite a court's consideration of an invalid aggravating factor if a state appellate court either: (1) reweighed the aggravating factors and mitigating evidence and found that the

death sentence is still supported by the evidence; or (2) determined that the jury's consideration of the invalid factor was harmless error beyond a reasonable doubt. *Stringer*, 503 U.S. at 230 (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990)); *Chapman v. California*, 386 U.S. 18, 24 (1967).

In conducting a harmless error analysis, "[a] [state] appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined." *Jones v. United States*, 527 U.S. 373, 402 (1999) (citing *Clemons*, 494 U.S. at 753-54). Either way, the defendant must have received an "individualized sentenc[e]" from the jury, *Stringer*, 503 U.S. at 230, which means that the jury selected the sentence based on "the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983). This determination requires the state appellate court not simply to assume that absent the invalid factor, the jury still would have given a death sentence, *Stringer*, 503 U.S. at 231, but instead, to review the evidence before it, including the mitigating evidence. *See Parker v. Dugger*, 498 U.S. 308, 321-22 (1991).

There is another analytical route by which a court may decide the validity of a death sentence based in part, on an invalid factor. It is the route taken by the United States Supreme Court in rejecting Cone's vagueness challenge to the HAC factor. *Cone II*, 543 U.S. at 459. If a court finds that a factor is invalid because the factor is unconstitutionally vague, a jury's improper reliance on that factor may be "cured" by a

state appellate court sufficiently limiting the vague language of the factor by applying a narrowing construction. *See Lambrix v. Singletary*, 520 U.S. 518, 531, 537 n.6 (1997); *Stringer*, 503 U.S. at 230. In other words, "[there are] two distinct and permissible routes to satisfy the Eighth Amendment [prohibition against cruel and unusual punishment] where the sentencer considered a vague aggravator: a court's finding of the aggravator under a proper [narrowing] construction, *or* independent reweighing of the circumstances." *Lambrix*, 520 U.S. at 537 n.6. Therefore, when a state appellate court undertakes to "cure" the sentencer's consideration of an unconstitutionally vague aggravating factor by giving the flawed factor a narrowing construction, that is the end of it, and no further harmless error analysis is necessary. *Lambrix*, 520 U.S. at 537 n.6; *Richmond*, 506 U.S. at 47.

In its last decision in this case, the United States Supreme Court held that even assuming that the HAC factor relied on by the sentencing jury in Cone's case was facially vague, the Tennessee Supreme Court should be *presumed* to have applied a narrowing construction. *Cone II*, 543 U.S. at 456-58. Therefore, the Court reasoned, the presumed narrowing of the presumptively unconstitutional HAC factor rendered the factor's vague language constitutionally sufficient. *Id.* at 459-60. The Court concluded that the Tennessee court's affirmance of Cone's death sentence on this issue was "not contrary to . . . clearly established Federal law" and *habeas* relief should not be granted. *Id.* at 460.

These findings by the Supreme Court close the HAC aggravating factor issue and we find that the jury's reliance on the HAC factor in sentencing Cone

does not constitute a constitutional infirmity. Cone's argument to the contrary—that he should get relief because the jury considered the vague HAC factor and no court found this error harmless or conducted a new sentencing calculus—misreads Supreme Court precedent. As we have said, because the Supreme Court presumed that the Tennessee Supreme Court applied a narrowing construction, *Cone II*, 543 U.S. at 456-58, any error by the jury in relying on this factor was "cured." *See Richmond*, 506 U.S. at 47.

We also reject Cone's claim that he deserves a new sentencing hearing because the jury erroneously relied on the "great risk of death" factor. It is true that the Tennessee Supreme Court acknowledged that the jury finding on this factor was not supported by the evidence, but Cone is not entitled to a new sentence unless the Tennessee Supreme Court did not (1) conduct a proper harmless error analysis; *or* (2) reweigh the mitigating and aggravating factors in examining his sentence. *Stringer*, 503 U.S. at 230. Tennessee appellate courts generally do not reweigh, but instead conduct a harmless error analysis when faced with jury reliance on an invalid sentencing factor. *State v. Howell*, 868 S.W.2d 238, 259-61 (Tenn. 1993). As the *Howell* court recognized, the Tennessee Supreme Court did just such an analysis in this case. *See id.* at 260 (citing *Cone*, 665 S.W.2d 87). The Tennessee Supreme Court explicitly decided that the jury's consideration of the "great risk of death" factor "was harmless beyond a reasonable doubt and does not warrant the granting of a new sentencing hearing." *Cone*, 665 S.W.2d at 95.

While the Tennessee Supreme Court's statement that it found harmless error is significant in our

upholding that decision, *see Sochor v. Florida*, 504 U.S. 527, 540-41 (1992), the opinion further demonstrates that the court performed a proper harmless error analysis. Although the Court's opinion does not spell out its harmless error analysis in explicit terms, in discussing the jury's erroneous consideration of the "great risk of death" factor, the opinion examines the evidence supporting each aggravating circumstance found by the jury and finds that the other aggravating circumstances "were clearly shown by the evidence." *Cone*, 665 S.W.2d at 94. Earlier in the opinion, in a section immediately preceding a discussion of the claims Cone raised on appeal, the court explicitly discussed the mitigating evidence presented by Cone at trial and the contrary evidence presented by the government on that issue. *Id.* at 92. The court concluded: "[W]e have reviewed the sentence of death in this case and are of the opinion that it is not in any way disproportionate under all of the circumstances." *Id.* at 95. The court's analysis shows that it looked at "whether absent [the] invalid ["great risk of death"] factor, the jury would have reached the same verdict," *see Jones*, 527 U.S. at 402, and found that the sentence was appropriate. Contrary to Cone's claims, the court did not just "assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer*, 503 U.S. at 232. Therefore, Cone has failed to establish that the Tennessee Supreme Court's affirmance of his death sentence was contrary to clearly established law and, therefore, we may not grant relief on this claim.

IV.

Cone's second claim raises an issue previously

decided by this court: whether the state prosecutors withheld evidence from Cone in violation of *Brady*, 373 U.S. 83. The *Brady* rule requires the government "to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). A government violation of this rule is grounds for setting aside a conviction or sentence only if the failure to disclose the relevant evidence "undermines confidence in the verdict, because there is a reasonable probability that there would have been a different result had the evidence been disclosed." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998).

Cone's claim is actually better described as four separate *Brady* claims because Cone asserts that four groups of documents were withheld from him in violation of *Brady*. They are: (1) evidence regarding his drug use; (2) evidence that might have been useful to impeach the testimony and credibility of prosecution witness Sergeant Ralph Roby; (3) FBI reports; and (4) evidence showing that prosecution witness Ilene Blankman was untruthful and biased. We examined these four claims in our first opinion and found that each one had been procedurally defaulted. *Cone*, 243 F.3d at 968-70. Three of the claims had been procedurally defaulted because the Tennessee state court held the claims were previously determined or waived and that holding amounted to an independent and adequate state law ground barring our considering the claims. *Id.* The remaining claim, the FBI reports, had been procedurally defaulted because Cone failed to argue it in state court. *Id.* at 970. Cone also did not overcome this procedural default by showing both (a) reasonable cause for his failure to timely raise these

claims, and (b) unfair prejudice from the withholding of the documents. *Id.* at 971. We held that Cone had not shown cause *or* prejudice for his first, second, and fourth *Brady* claims, and while he had shown cause for his third claim, the FBI reports, he had not shown any prejudice. *Id.* Therefore, we held that Cone's *Brady* claims were not properly before us. In the alternative, we held that even if Cone could establish cause and prejudice to overcome his procedural default, "we are satisfied that the documents Cone complains were withheld are not *Brady* material." *Id.* at 968.

Given these prior rulings, we may not, because of the law of the case doctrine, reconsider Cone's *Brady* claims unless "'exceptional circumstances'" exist. *Westside Mothers*, 454 F.3d at 538 (citation omitted). Cone argues that the Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668, provides the necessary "exceptional circumstance[]" because it decided a "subsequent contrary view of the law" after our first decision in Cone's case. *See Westside Mothers*, 454 F.3d at 538. According to Cone, *Banks* "held that when the state withholds evidence which is material to a jury's death-sentencing determination, a petitioner has 'cause and prejudice' for any failure to timely present such claims in state court." Since the prosecution withheld mitigating evidence, Cone argues he had "cause and prejudice" under *Banks*. We disagree.

Contrary to Cone's arguments, *Banks* does not require us to review our prior findings. In *Banks*, the Supreme Court, citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), stated the familiar rule for overcoming procedural default: that the petitioner must show cause and prejudice. *Banks*, 540 U.S. at 691. The Court recounted that a petitioner shows

"cause" when he demonstrates that his failure to develop facts in the state court proceedings was due to the prosecution's suppression of the relevant evidence and "prejudice" "when the suppressed evidence is 'material' for *Brady* purposes." *Id.* (quoting *Strickler*, 527 U.S. at 282). The *Banks* Court then analyzed each of these factors separately to find cause and prejudice. *Id.* at 692-703. The Court did not find cause and prejudice *solely* because the prosecution withheld evidence. Therefore, the Supreme Court did not decide a "subsequent contrary view of the law" that would lead us to disregard the law of the case here.

Furthermore, any attempt by Cone to analogize *Banks* to his case is misplaced because the Court's finding of cause and prejudice in *Banks* is distinguishable from Cone's case. The Supreme Court found that Banks showed "cause" by proving three factors: (a) the prosecution withheld exculpatory evidence; (b) Banks reasonably relied on the prosecution's open file policy to fulfill its *Brady* responsibilities; and (c) the State confirmed Banks's reliance on the prosecution's representation that it had disclosed all *Brady* material. *Banks*, 540 U.S. at 692-93. The Court concluded: "In short, because the State persisted in hiding [the witness's] informant status and misleadingly represented that it had complied in full with its *Brady* disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceedings, [the witness's] connections to [the police]." *Id.* at 693. This circuit has held that "prosecutorial concealment and misrepresentation" was key to the *Banks* holding and rejected a petitioner's argument that the prosecution's withholding of documents alone, *i.e.*, without

prosecutorial misconduct, demonstrates cause. *Harbison v. Bell*, 408 F.3d 823, 833 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1888 (2006).

This distinction is applicable here. Cone has not presented any evidence of prosecutorial concealment or shown his reliance on false prosecutor statements. Instead, he summarily concludes that *Banks* supplies the necessary cause without explaining how the facts of his case match Banks' case. *Banks* thereby does not give us reason to revisit our prior decision that three of Cone's *Brady* claims lack cause for his procedural default.

In *Banks*, the Court found "prejudice" because the government witness, whose testimony may have been impeached with the withheld *Brady* material, presented evidence on a key element of the case and was not corroborated by another witness. *Banks*, 540 U.S. at 700. The Court found this uncorroborated testimony on a key issue combined with the prosecutor's misrepresentations and concealment of the issue showed a reasonable probability that the outcome of the case would have been different if Banks had received the withheld evidence. *Id.* at 699-701.

But Cone has not made a similar showing. In his most recent brief, claiming that his receiving the withheld evidence would have resulted in a different sentence, Cone has made only conclusory arguments. Cone introduced considerable evidence that he had a drug habit, *Cone*, 665 S.W.2d at 92, and so we have no basis to conclude that the result of his trial would have come out differently had the *Brady* evidence been given to him. *See Coe*, 161 F.3d at 344. *Banks* thereby does not give us reason to revisit our prior decision

that Cone has not shown prejudice. We therefore will not disturb our decision that Cone's *Brady* claims are procedurally defaulted and not before this court.

Cone argues in the alternative that even without a showing of "cause and prejudice" this court can review three of his *Brady* claims—the mitigating drug evidence, the Roby impeachment testimony, and the Blankman testimony—because those claims were not procedurally defaulted under state law.

It is well settled that a *habeas* petitioner must exhaust his available remedies in state court before a federal court may grant *habeas* relief. 28 U.S.C. § 2254(b)(1)(A). If the state court decides the petitioner's claims on an adequate and independent state ground, such as a state procedural rule, the petitioner's claims are considered procedurally defaulted and he is barred from seeking federal *habeas* relief. *Wainright v. Sykes*, 433 U.S. 72, 86-87 (1977). Under Tennessee law, grounds for relief which have been "waived or previously determined" are not cognizable in a state post-conviction action. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). The Tennessee courts held that Cone's *Brady* claims were previously determined under this rule, *State v. Cone*, No. P-06874 (Tenn. Crim. Ct. filed December 16, 1993) *aff'd* 927 S.W.2d 579 (Tenn. Crim. App.1995), and we found that Cone's claims were therefore procedurally defaulted. *Cone*, 243 F.3d at 969-70.

Cone looks to *Hathorn v. Lovorn*, 457 U.S. 255 (1982), to challenge our finding of procedural default. While the general rule is that a petitioner's failure to comply with a state procedural rule may constitute an independent and adequate state ground of decision

and bar a federal court's review of a federal question raised in state court, *Hathorn* held that a federal court will not be prevented from hearing a federal question raised in state court if the state court did not follow established state procedural rules. *Id.* at 262-63. Therefore, Cone argues, if the Tennessee court rested its finding that Cone's three *Brady* claims were previously determined upon a Tennessee procedural rule that was not "'firmly established and regularly followed,'" *Hutchison v. Bell*, 303 F.3d 720, 737 (6th Cir. 2002) (quoting *Ford v. Georgia*, 498 U.S. 411, 424 (1991)), then no independent and adequate state ground precludes this court from reviewing Cone's three *Brady* claims.

While we do not take issue with Cone's statement of the general rule, we find it is inapplicable to his case. We have already decided that Cone's claims are procedurally defaulted and so we would need to find an "exceptional circumstance[]" to revisit that decision. *Westside Mothers*, 454 F.3d at 538. We do not find any such circumstance. Even if we were disposed to ignore our prior decision on this issue, we find that Cone's argument has no merit. To determine whether a state procedural rule is firmly established, a court looks at "whether, at the time of the petitioner's actions giving rise to the default, the petitioner 'could not be deemed to have been apprised of [the rule's] existence.'" *Hutchison*, 303 F.3d at 737 (quoting *Ford*, 498 U.S. at 423). The petitioner must demonstrate more than "'[a]n occasional act of grace by a state court in excusing or disregarding a state procedural rule' in order for a federal court to conclude that the state procedural rule is inadequate because inconsistently applied." *Id.* (quoting *Coleman v. Mitchell*, 268 F.3d

417, 429 (6th Cir. 2001)).

Cone has not shown that Tennessee did not consistently follow its procedural rules such that we should have disregarded Tennessee's finding that his *Brady* claims were previously determined. While Cone cites a few cases in an attempt to show inconsistent application of Tennessee's procedural rules, they do not support the claim that Tennessee's waiver rule was not "'firmly established and regularly followed.'" *Hutchison*, 303 F.3d at 737 (citation omitted). Rather, the rules were firmly established and the Tennessee courts applied them here. We again find that Cone's claims are procedurally defaulted and we reject Cone's request to reconsider his *Brady* claims.

The dissent challenges our reliance on the law of the case doctrine, arguing that, on this third appeal, we should find our prior holding of procedural default no longer valid because Cone's *Brady* claims have never been decided by a court. The Tennessee courts found that Cone's *Brady* claims were "previously determined" and, therefore, not cognizable in Cone's state post-conviction action, *Cone v. State*, No. P-06874 (Tenn. Crim. Ct. filed Dec. 16, 1993), *aff'd*, 927 S.W.2d 579 (Tenn. Crim. App. 1995). However, after an impressively close scrutiny of the enormous state court record, our brother finds as a matter of fact that the Tennessee trial and appellate courts have repeatedly misstated the record. Our brother's fact-finding raises interesting questions as to a federal appellate court's authority on review of the denial of a *habeas* petition to make its own findings of fact contradicting a state court's findings on the contents of the state court record.

We need not be delayed by these interesting questions of federalism, however, because, in all events, the documents discussed in the dissenting opinion that were allegedly withheld are not *Brady* material. We said this before in *Cone*, 243 F.3d at 968-70, and we now say it again. A review of the allegedly withheld documents shows that this evidence would not have overcome the overwhelming evidence of Cone's guilt in committing a brutal double murder and the persuasive testimony that Cone was not under the influence of drugs. The dissent narrowly focuses on Sergeant Roby's testimony that "he knew of no evidence of drug addiction or abuse," dissent p. 13, and FBI Agent Eugene Flynn's testimony that he had "found no evidence of drug addiction," dissent p. 13. The dissent's argument, apparently, is that some of the undisclosed documents were prior inconsistent statements by Roby and Flynn that could have been used to impeach their credibility. While it is far from clear that these documents were indeed prior inconsistencies by Roby and Flynn, even if they were, they would have been admissible under Tennessee law, only to impeach veracity and not for their truth. *See Dailey v. Baseman*, 937 S.W.2d 927, 930 (Tenn. Ct. App. 1996). The third category of undisclosed documents are said to be (1) hearsay statements by Chief Daniels to Memphis police investigators that Cone "was a heavy drug user," and (2) statements by "[t]here other witnesses" that the day before the murder, Cone looked "weird" and on drugs, or "wild-eyed." Dissent, p. 13.

It would not have been news to the jurors, that Cone was a "drug user." They had already heard substantial direct evidence that he was a drug user,

including the opinion of two expert witnesses, the testimony of Cone's mother, drugs found in Cone's car, and photographic evidence. Despite this evidence, the jurors concluded that Cone's prior drug use did not vitiate his specific intent to murder his victims and did not mitigate his culpability sufficient to avoid the death sentence. In short, the allegedly withheld evidence catalogued by the dissent does not "undermine confidence in the verdict because there is [not] a reasonable probability that there would have been a different result had the evidence been disclosed," *see Coe*, 161 F.3d at 344, and so we reject Cone's *Brady* claims.

V.

Cone's third claim is that death by electrocution violates the Eighth Amendment. We explicitly did not address this claim in our first decision, *Cone*, 243 F.3d at 975, and so we address it now for the first time. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. In Tennessee, electrocution was the only method of execution until 1999 when the legislature made lethal injection the default method, but gave inmates a choice of electrocution if they had committed their crime before January 1, 1999. Tenn. Code Ann. § 40-23-114. The Supreme Court has declared that in a state where the default method of execution is lethal injection and a person chooses to be executed by lethal gas that person has waived any objection he may have to the method of lethal gas. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999).

Cone, who committed his crimes in 1980, has chosen electrocution over lethal injection and now

argues that electrocution violates the Eighth Amendment's prohibition on cruel and unusual punishment. Since Cone selected a method of execution different from the state's default method, his objections to his chosen method of execution are waived and we do not reach the merits of his claim. *See id.* We note that even if Cone's claim could move forward, neither the Supreme Court nor this circuit has concluded that electrocution offends "'the evolving standards of decency that mark the progress of a maturing society,'" *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (citation omitted), and constitutes cruel and unusual punishment. *Williams v. Bagley*, 380 F.3d 932, 965 (6th Cir. 2004), *cert. denied*, 544 U.S. 1003 (2005); *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997); *see also In re Kemmler*, 136 U.S. 436, 443 (1890).

We decline to grant relief on Cone's Eighth Amendment claim.

VI.

Cone has a number of remaining claims: (1) the prosecutor made false arguments to the jury; (2) Cone received ineffective assistance of counsel; (3) the judge gave misleading jury instructions; (4) women were systematically underrepresented as grand jury forepersons when Cone was indicted; and (5) Cone was denied the right to counsel during trial.

We have previously decided the first of Cone's remaining claims and there are no "'exceptional circumstances,'" *Westside Mothers*, 454 F.3d at 538 (citation omitted), that would warrant our not following the law of the case. In our first decision we held:

> We find that the statements made by the prosecutor referring to Cone as a drug seller are not material, and we agree with the district court that the statement was too remote from the real issues in this case to have affected the jury's deliberations. Cone's drug psychosis defense was not substantially undercut by the prosecutor's remarks; rather, Cone simply did not present credible evidence that he was using drugs at the time he committed the murders. Under 28 U.S.C. § 2254(d), this decision does not appear to be contrary to, or involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

Cone, 243 F.3d at 973. As we have already decided this issue, we reject Cone's request to reconsider this claim.

We are also precluded under the law of the case doctrine from considering Cone's claim that he received ineffective assistance of counsel. Cone raised only two ir.effective assistance of counsel claims in his first post-conviction relief petition: (a) the failure of counsel to object during the State's argument at sentencing; and (b) the failure of counsel to present evidence in mitigation at the sentencing phase of the trial. We may not consider either of these claims because the United States Supreme Court has held that the Tennessee courts did not err in rejecting Cone's Sixth Amendment arguments on these issues. *Cone I*, 535 U.S. at 697, 700-02.

Any other ineffective assistance of counsel claims by Cone are procedurally barred because they were not raised until Cone's second petition for post-conviction

review. A petitioner must exhaust his available remedies in state court before a federal court may grant post-conviction relief. 28 U.S.C. § 2254(b)(1)(A). As previously discussed, if the state court decides the petitioner's claims on an adequate and independent state ground, such as a procedural rule, the petitioner's claims are considered procedurally defaulted and he is barred from seeking federal *habeas* review. *Wainwright*, 433 U.S. at 86-87. Under Tennessee law at the time, a claim not brought in a prior proceeding is presumed to be waived. Tenn. Code Ann. § 40-30-112(b)(2) (1990) (since repealed). Cone has not shown "cause and prejudice" to excuse the default. Therefore, his ineffective assistance claims raised in later petitions are procedurally barred.

Cone's claim of denial of counsel at trial suffers a similar fate. Cone specifically claims that he was denied his Sixth Amendment right to counsel by not being allowed to sit at counsel table during trial. This claim was not raised until an amendment to his second state post-conviction petition, rather than his first petition, and so it is procedurally defaulted. Cone has not made any attempt to show "cause and prejudice" for this claim and so we may not reach it.

Cone admits that his remaining two claims—misleading jury instructions and grand jury sex discrimination—fail under a prior decision of this court. *See Salmi v. Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). In *Coe v. Bell*, we approved a jury instruction regarding unanimity identical to the one used in Cone's case and we also held that it was not error for a district court to hold that a male defendant lacked standing to raise a claim of discrimination against females in jury selection.

Coe, 161 F.3d at 337-39, 352-53. Since Cone admits that *Coe* controls his claims, that is the end of the matter.

VII.

Cone's petition for federal *habeas* relief has come before this court for a third time. We find that the law of the case directs us to **AFFIRM** once again the denial of those claims we have previously addressed and decided.

We **AFFIRM** the district court's rejection of Cone's remaining claims for the reasons we have given, and deny the petition for *habeas* relief.

DISSENT

MERRITT, Circuit Judge, dissenting. At least three serious problems exist in this case. First, the State deliberately concealed mitigating evidence of Cone's drug addiction and mental illness in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As will be demonstrated below, the bulletins and teletypes sent out by the police at the time of the murders clearly show that the police believed Cone to be a drug addict.

Second, embedded within the *Brady* problem is the majority's failure to acknowledge and follow the long-established, bedrock principle of mitigation under the Eighth Amendment that forbids a state sentencing process that limits or proscribes the full consideration of addiction or other mitigating evidence by the jury. That principle was reiterated and explained once again by the Supreme Court as recently as April 25, 2007, in *Abdul-Kabir v.* Quarterman, 550 U.S. ____, 127 S. Ct. 1654 (2007). In that case, the Court stated in the text and accompanying footnote its holding that applies equally to Cone's claim:

> the basic legal principle that continues to govern such [mitigation] cases: The jury must have a 'meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence[21]
>
> 21. A jury may be precluded from doing so not only as a result of the instructions it is given, *but*

> *also as a result of prosecutorial argument . . . .*"

127 S. Ct. at 1671 n.21 (emphasis added, citations omitted). In the present case the trial prosecutor's argument, outlined below, combined with his concealment of mitigating evidence, prevented the jury from giving effect to Cone's evidence of drug addiction which arose from a post-traumatic stress disorder from the Vietnam War.

Third, the majority fails to acknowledge that we were wrong in our earlier reliance on procedural default on Cone's claim that the State concealed mitigating evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). I — and I believe my colleagues, as well — originally failed to understand the record correctly. The basic problem, as will be explained below, is that Cone presented a colorable *Brady* claim in the 1993 state habeas proceedings within a few months of discovering the documents wrongfully withheld by the State prosecutors. Cone presented this *Brady* claim as an amendment to his second post-conviction petition along with the 51 other pending claims. The claim was overlooked in the press of other claims, and the State trial court and Court of Appeals mistakenly asserted that the claims had been "previously determined" at earlier stages of the review process. In fact, Cone's lawyer had discovered the present *Brady* claim just before he filed it; it had not been previously presented or adjudicated. And to make matters worse, no court, state or federal, has as yet reviewed the claim on the merits. Four courts — two state courts and two federal courts — have now misconstrued the record and declined to hear the merits after invoking the doctrine of "procedural

default." These kinds of errors are risks that we all run — lawyers and judges alike — when presented with a large mass of claims and arguments, especially in death penalty litigation, a dense and difficult field.

The failures of the state and federal judiciaries to consider the claim properly were caused by the misrepresentations of the record in the case by the Tennessee Attorney General and his appellate staff. The majority does not acknowledge, analyze or seek to provide a remedy for the complete falsification of the procedural record in this case by the Tennessee Attorney General's appellate counsel concerning the State's procedural default defense to the *Brady* claim. I will outline below the unacceptable conduct engaged in by the State's appellate prosecutors in this litigation.

We should reverse our previous erroneous decision invoking procedural default and remand the case to the District Court for a full review of the merits of Cone's claim that combines a *Brady* violation together with an Eighth Amendment mitigation violation. I will briefly explain the claim and then how the mistake was made in each of the four courts that led them erroneously to invoke procedural default rather than reach the merits. Cone deserves a full hearing on the merits of his claim in the District Court. I would not resolve the other complex claims in the case until the *Brady*-mitigation claim is fully litigated in the District Court on the merits.

I. Cone's *Brady* Claim

In 1980, Gary Cone, who has a high IQ and a college education, committed an unprovoked brutal

murder in Memphis. Before that, he fought in the Viet Nam conflict, received a bronze star for bravery in combat, and came home with a mental illness. He returned addicted to drugs and suffering from a serious post-traumatic, wartime stress disorder. The State prosecutor decided to seek the death penalty despite the mitigating evidence and needed to undermine any possible feelings of sympathy that a juror might have for such a mentally ill man guilty of a brutal murder. The prosecutor wanted the jury to feel a strong sense that it should seek retribution for the murder by imposing a sentence of death. In final argument at the guilt phase of the trial, the prosecutor falsely dismissed Cone's mental illness and argued that Cone "says he's a drug addict," but "I say baloney." During the final argument, the prosecutor flatly told the jury that there was no evidence of drug addiction and, therefore, no mitigating evidence. He reminded them that the State's medical experts "saw no evidence of any kind, any extent of mental disease or defect" from drug use or any other form of post-traumatic stress syndrome. (App. 150.) The prosecutor repeated the testimony of a witness, Ilene Blankman, that there was no such evidence of drug abuse. (App. 158.)

The prosecutor did not want evidence inconsistent with this theory of the case to come before the jury. So far as the prosecutor was concerned, Cone was a perfectly intelligent and normal but evil man who should be executed for the good of society. The prosecutor did not answer Cone's motion for exculpatory evidence of drug addiction or mental illness by turning over the substantial mitigating evidence that the State had in its files. The prosecutor

was successful in undermining any feelings that Cone's mental illness and drug addiction were mitigating reasons for sparing his life. In rejecting what it called Cone's "tenuous defense, at best," and affirming the death sentence in 1984, the Tennessee Supreme Court explained that the only evidence of drug addiction and mental illness that the jury heard was "based purely on his [Cone's] personal recitation," and that his "known pattern of conduct" and "the testimony of several witnesses" "raised serious doubts" that he "was under the influence of or experiencing withdrawal from drugs" about his mental illness and drug addiction, the Tennessee Supreme Court said:

> The only defense interposed on his behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. *Their testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse.*

Cone v. Bell, 665 S.W.2d 87, 90 (Tenn. 1984) (emphasis added). The prosecutors, trial and appellate, convinced both the jury and the Supreme Court that there was no mitigating evidence. (In Tennessee, the trial prosecutor comes from the local district attorney's

office, and appellate and habeas counsel come from the Tennessee Attorney General's staff.)

The exculpatory evidence of drug addiction and mental illness lay in the files of the State police and prosecutor's offices undiscovered by Cone's lawyers. Then, eight years after the opinion of the Tennessee Supreme Court, over the strong, persistent objection of State prosecutors in the State Attorney General's Office, these files became available for the first time as a result of a decision by Judge Cantrell in the Tennessee Court of Appeals, *Capital Case Resource Center of Tennessee, Inc. v. Woodall*, No. 01-A-019104CH00150, 1992 WL 12217 (Jan. 29, 1992), holding that such police records must be made available under the Tennessee Public Records Act. Based on this decision, Cone's lawyers searched through these records and found for the first time mitigating evidence that the State prosecutor had refused to disclose in response to the motion for exculpatory evidence.

When Sergeant Roby of the Memphis Police Department testified at the trial that he knew of no evidence of drug addiction or abuse, he also knew that he had sent out on August 10 and 11, 1980, detailed teletype all-points-bulletins to police departments around the country saying that Cone was armed, extremely dangerous and a drug user whose car contained "a large quantity of drugs." (App. 513, 515.) On August 12, he sent out a more detailed bulletin to selected police departments saying that Cone was "believed [to be a] heavy drug user." (App. 517-26.) These three police bulletins could have been used by defense counsel during trial to undermine Sergeant Roby's credibility, as well as to establish that it was

not "baloney" that Cone had the reputation for "heavy drug use." The undisclosed evidence supported the testimony of Cone's two experts concerning his heavy drug use and his mental illness. The documents tended to undermine the State's two expert witnesses who denied extensive drug use and mental illness. I do not agree with the majority that these documents containing mitigating evidence of drug addiction are not *Brady* material.

Police records also reflect that on August 11, 1980, the police chief of the town where Cone previously lived, Chief Daniels of the Lake Village, Arkansas, police department, advised the Memphis police investigators that Cone "was a heavy drug user." (App. 450.) Three other witnesses to events advised the police investigators that Cone appeared "weird" and on drugs or "looked wild-eyed" the day before the murders. (App. 449.)

The same problem exists with FBI Agent Flynn's testimony. He also testified that he found no evidence of drug addiction. Later-disclosed FBI documents contained teletypes sent around the country prior to Cone's arrest that refer to him as an "armed and dangerous drug user" and "subject believed heavy drug user." Cone has now produced ten such teletypes or letters. (App. 450-52.) I do not agree with the majority that these documents are not *Brady* material. Flynn, as the agent investigating the case, had to know that Cone had a reputation as a heavy drug user and that FBI documents so described him. Cone believes that this long string of FBI documents would have undermined Flynn's trial testimony, as well as the testimony of the State's two medical experts, and would have supported the testimony of Cone's medical

experts. If one or more jurors had believed that Cone was suffering from a post-traumatic combat stress mental illness and drug addiction — instead of believing it was just "baloney," as the trial prosecutor and the Attorney General's office insist — it is unlikely that the jury would have reached a verdict of death.

II. Eighth Amendment Mitigation Requirement

In this death penalty case, the constitutional right to show drug addiction in mitigation is particularly important because this was Cone's only way to prove a sufficient lack of mental capacity to avoid the jury's imposition of death in retribution for a brutal murder. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court stated "the Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments." *Lockett*, therefore, absolutely forbids a state sentencing process that limits or proscribes the full consideration of addiction and other mitigators by the sentencer. By ruling immaterial the documented proof of addiction contradicting the prosecution's "baloney" argument, the State and our court are permitting the execution of Cone in violation not only of *Brady* but also the Eighth Amendment's mitigation line of death penalty cases, ending with *Abdul-Kabir*, quoted above. In its companion mitigation case, *Brewer v. Quarterman*, 505 U.S. ____, 127 S. Ct. 1706 (2007), the Court stated that "there is surely a reasonable likelihood that the jurors accepted the prosecutor's argument at the close of the sentencing hearing" that Brewer's mitigating evidence of drug abuse and mental illness was irrelevant to the issues. The Court went on to say that the prosecutor told the jury that

"all they needed to decide was whether Brewer had acted deliberately and would likely be dangerous in the future, necessarily disregarding any independent concern that, given Brewer's troubled background, he may not be deserving of a death sentence." 127 S. Ct. at 1712. Cone's claim in this case is much stronger than *Brewer's* because the prosecution here not only misinterpreted the law, as in *Brewer*, but falsified the factual record. Cone should be allowed to advance his argument in mitigation that he does not deserve the death penalty. He should be allowed to go forward on the merits with his argument that the State has concealed mitigating evidence in violation of *Brady*.

III. The Procedural Default Mistake

There is no question in this case that counsel for Cone filed before trial an extensive three-page "Motion for Production of Exculpatory Evidence" that covered the waterfront of exculpatory material, as well as a "Motion for Disclosure of Impeaching Information." (App., Add. 1, doc. 1, pp. 54-56, 98-99.) The State does not claim that Cone did not request before trial the type of exculpatory evidence withheld from Cone.

Our Court's earlier mistaken ruling that the doctrine of procedural default barred the *Brady* claim was based on false statements of the record by the Tennessee Attorney General's office in its brief in this Court and by incorrect statements from the record by two Tennessee courts. In its brief before this Court, the State argues that the *Brady* claim "is clearly procedurally defaulted" because "Cone's *Brady* claims were simply never raised in the state court." (Final brief, pp. 12-13.) This "simply never raised" statement can itself only be characterized as a deliberate

falsehood. On October 5, 1993, soon after counsel for Cone learned of the existence of the exculpatory statements, counsel filed an amendment to his second petition for post-conviction relief in the criminal court of Tennessee at Memphis in which Cone was originally sentenced to death. The amendment's paragraph 41 stated the *Brady* claim as follows:

Additional Claims for Review

> 41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6, 7, 8, 9, 10, 11, 14, 16 and 17 of the Tennessee Constitution, *because the State withheld exculpatory evidence which demonstrated that petitioner that petitioner* [sic] *did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past*, such evidence including, but not limited to, statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins, and other persons unknown at this time, such statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollections of officers or others. Such evidence was highly exculpatory and exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors

> would not have convicted petitioner and would not have sentenced him to death.

(App. 2006) (emphasis added).

Two months later on December 16, 1993, the Criminal Court in Memphis, "William H. Williams, Senior Judge," dismissed this paragraph 41 *Brady* claim stating only:

> The petitioner, by way of his Third Amendment [to the second post-conviction petition] , continues with grounds *41*, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52, all of which grounds are clearly re-statements of previous grounds *heretofore determined* and denied by the Tennessee Supreme court and upon Direct Appeal or the Court of Criminal Appeals upon the First Petitioner.

(App. Add. 4, p. 233) (emphasis added). Judge Williams did not cite or attempt to point out when or how or what court had "previously determined" the claim. In fact, the *Brady* claim is never mentioned by the Tennessee courts in any previous opinion or order, including the Tennessee Supreme Court opinion on direct appeal quoted above, the trial court order on the first post-conviction petition, *Cone v. State*, No. P-3653 (Tenn. Crim. Ct. at Memphis, Sept. 19, 1986) (App. 1954) (mentioning only claims of prosecutorial misconduct and ineffective assistance of counsel), or the Tennessee Court of Appeals opinion affirming the denial of the first post-conviction petition on the same grounds, *Cone v. State*, 747 S.W.2d 353 (Tenn. Ct. Crim. App. 1987). Had Judge Williams read paragraph 41 closely, or made inquiry, or conducted a hearing, or

asked for briefs, it would have been obvious that the material had only recently been discovered and the new claim could not possibly have been "previously determined." The State prosecutors at the trial and appellate levels had been concealing the mitigating evidence for 10 years since the trial.

If the inattentive and unfocused treatment of a capital defendant's *Brady*-mitigation claim in the Memphis trial court shows a broken judicial system unable to cope with its responsibilities in capital litigation, the treatment of the claim on review in the Tennessee Court of Criminal Appeals was worse. At least Judge Williams did not excoriate *pro bono* defense lawyers for diligently pursuing their duty to represent Cone. In Cone's appellate brief in the Tennessee Court of Criminal Appeals, filed August 22, 1994, counsel pointed out that the trial court was clearly in error. Counsel pointed out that the trial court did not address or examine "each individual issue" and that a reading of the decisions "clearly shows that the issues were neither presented on direct appeal nor addressed in the initial post-conviction petition." (App. Add. 4, p. 16.) But, in a brief opinion, the Tennessee Court of Criminal Appeals, like the trial court, did not specifically address the *Brady*-mitigation issues. The opinion begins:

> Appellant contends that the trial court's dismissal of his second petition was premature, because . . . the trial court declined to hold an evidentiary hearing . . . . Our conclusion as to the timeliness of the trial court's dismissal is therefore dependent on our resolution of the substantive issues of waiver and previous determination.

. . . .

> Had Judge Williams not provided this court with such an exemplary and meticulous treatment of the appellant's petition, our task in reviewing the relevant issues would have been difficult if not insurmountable.

. . . .

> The trial court found that most of the appellant's stated grounds for relief, in addition to being repetitious and cumulative, were previously determined either on direct appeal or in the appellant's first petition.

Cone v. State, 927 S.W.2d 579, 580-81 (1995). After denying all of the claims without specifically addressing them, the Tennessee Court of Criminal Appeals then criticized Cone's lawyers:

> [T]he appellant should not be able to extend the post-conviction process and delay the administration of justice *ad infinitum* by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed.

Id. at 582. The Court then says that counsel's "perpetual disrespect for the finality of convictions disparages the entire criminal justice system" and further complains about counsel's conduct: "The courts, the executive branch of the government, the legal profession, and the public have been seriously inconvenienced by the prosecutions of baseless habeas corpus and post-conviction proceedings." *Id.* Counsel

for Cone filed a petition for review in the Tennessee Supreme Court of this decision setting out the *Brady* claim in detail. The Tennessee Supreme Court denied review. This treatment of Cone's claim illustrates a completely broken system of review in capital cases in Tennessee.

The judge of the Court of Criminal Appeals who wrote the opinion stating that the *Brady* issue was "previously determined," then became the Attorney General of the State by the time the issue came to federal court. When the issue was later presented to the federal courts, including this Court, the Attorney General maintained his previous judicial position that the *Brady* claim was "previously determined" but shifted the main focus to: "Cone's *Brady* claims were simply never raised in the state court." (Final Brief, p. 12.) In the federal court, the Attorney General attempts to conceal the very fact that the claim of *Brady* concealment was even presented in the Memphis trial court by stating that the "claims were simply never raised in the state court." Of course, the two procedural default defenses to the *Brady* claim — "never raised" and "previously determined" — cannot both be true. The fact is that neither is true. They were clearly raised but never decided. The Attorney General is deliberately falsifying the procedural record in the case.

It is difficult to tell exactly what the District Court below held with respect to the *Brady* claims. The District Court mixes the *Brady*-mitigation claims up in a discursive discussion of ineffective assistance of counsel claims, moving from a discussion of these *Brady* claims on page 17 of the opinion below (App. p. 1549) to a discussion of ineffective assistance of

counsel and then back to the claims at page 27. (App. 1559.) All we can really tell about the District Court's disposition of the *Brady*-mitigation claims is that the court said they are procedurally defaulted. It is unclear why they are procedurally defaulted. The District Court seems to agree at page 1559 with the Attorney General's false argument that the claims have "never been presented to the state courts" and "are now barred by the state post-conviction statute of limitations." In a footnote at this point, the District Court relies upon Tennessee's three-year statute of limitations for filing post-conviction petitions. T.C.A. § 40-30-102. The Court begins the limitation period on July 1, 1986, long before Cone discovered the mitigation evidence that the prosecutor at the trial and appellate levels had concealed. Despite the inconsistency between the State's witnesses (Roby, Flynn and the two experts) and the newly-discovered documents, the District Court wound up its discussion by saying:

> The evidence of Cone's guilt was overwhelming, and the material evidence that he was acting under the influence of amphetamine psychosis was, and continues to be, virtually nonexistent.

(App. 1563-64.) In our Court's earlier opinion invoking procedural default, we accepted the mistake of Judge Williams in the Memphis trial court and the Tennessee Court of Criminal Appeals by repeating three times that the "independent and adequate state ground in this instance is the State court's finding that Cone's claims were previously determined." 243 F.3d 969. We accepted the Attorney General's alternative argument and based our holding of procedural default

on the Tennessee courts' mistaken position that the claims were "previously determined." This is simply false.

The law of the case doctrine relied on by the majority does not wed us forever to a clear misreading of the record, especially a misreading brought about by the State's falsification of the record in the case. Courts should correct their mistakes where important matters are concerned, and a man's life is an important matter. The previous decisions of the Supreme Court and this Court tell us what is obviously true: "Death is different." Mistakes cannot be corrected after a man is executed. They must be corrected now. I would set aside the previous "procedural default" ruling on Cone's claim and remand the case to the District Court for a full hearing on the merits regarding his mitigating evidence that the State has now attempted to conceal for 25 years.

After relying on procedural default throughout its first opinion in this case, and now relying on procedural default again in its present opinion, the majority throws up its hands and says, "Well, anyway, all the withheld documents are not really *Brady* material." It does so without any analysis of the record, or the *Brady* and mitigation lines of cases, and states no basis for its conclusory statement. The majority's conclusory "well anyway" attitude is just as conclusory and misleading as the prosecutor's false, death knell statement to the jury that the defense statement was "baloney" that Cone was not a heavy drug user as a result of his wartime experience. The undisclosed, withheld documents directly contradict both the prosecutor's "baloney" statement and the majority's "not *Brady* material" conclusion. And

beyond these errors, the majority seems totally unconcerned that the Tennessee Attorney General's office has completely falsified the procedural record in the case by asserting that the *Brady*-mitigation claims were both "never raised" and "previously determined."

APPENDIX C

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2001 FED App. 0077P (6th Cir.)
File Name: 01a0077p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE,
Petitioner-Appellant,

v.

No. 99-5279

RICKY BELL, Warden, Riverbend Maximum Security Institution,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 97-02312—Jon Phipps McCalla, District Judge.

Argued: September 12, 2000

Decided and Filed: March 22, 2001

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF:** Robert L. Hutton, GLANKLER & BROWN, Nashville, Tennessee, for Appellant. Tonya G. Miner, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee.

OPINION

RYAN, Circuit Judge. Gary Bradford Cone was convicted in a Tennessee state court on two counts of first degree murder, two counts of murder in the perpetration of a burglary, three counts of assault with intent to commit murder, and one count of robbery by use of deadly force. He was sentenced to death. His appeal to the Tennessee Supreme Court and two post-conviction petitions for relief were unsuccessful. He then filed a petition for a writ of *habeas corpus* in the federal district court, and it was denied. This court issued a certificate of appealability.

We now affirm the denial of Cone's petition with regard to the offenses of conviction but grant his petition with respect to the death sentence because, in the sentencing phase of his trial, Cone was denied the

effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution.

I.

Facts

The crime spree that culminated in Cone's conviction and sentence to death began on August 9, 1980, when he robbed a jewelry store in Memphis, Tennessee, of approximately $112,000 worth of goods. The police were alerted and they promptly spotted Cone driving a car. A high speed chase ensued, following which Cone abandoned the car in a residential neighborhood, shot pursuing police officer B.C. Allen and citizen John Douglas Clark, and unsuccessfully tried to shoot a third citizen, Herschel Dalton when Dalton refused to surrender his car to Cone. Cone temporarily eluded the police, but they seized his car and in it found a large amount of cash, drugs, and the stolen jewelry.

The next day, Cone appeared in the same residential neighborhood at the home of Lucille Tuech. He drew a gun on Tuech when she refused to let him in to make a phone call. Later the same day, Cone broke into the home of an elderly couple, Shipley and Cleopatra Todd, who were 93 and 79 years old, respectively. Cone tried to convince the couple to help him, but when they refused to cooperate, he brutally killed them. Three days later, the Todds' severely beaten and mutilated bodies were found in their home. Cone's fingerprints and hair samples were also found in the home. In due course, Cone was arrested in Florida and returned to Tennessee.

II.

State Court Trial Proceedings

Cone's jury trial was held in Shelby County Criminal Court beginning on April 14, 1982. It concluded with a jury verdict that found him guilty of: (1) two counts each of first degree murder and murder in the perpetration of a burglary involving the Todds; (2) assault with intent to commit murder in the first degree against Officer Allen, Clark, and Dalton; and (3) robbery with a deadly weapon, of the jewelry store clerk. Cone was sentenced to 10 to 25 years in prison on the assaults, life imprisonment on the robbery, and death on the two murder charges. He appealed as of right to the Tennessee Supreme Court, which affirmed the conviction and sentence.

A.

State Court Collateral Proceedings—First Petition

On June 22, 1984, Cone filed his first state post-conviction petition, attacking his conviction and death sentence. He alleged that his rights had been violated under the First, Fourth, Fifth, Sixth, Eight, Ninth, and Fourteenth Amendments to the United States Constitution, and particularly, that he had been denied the effective assistance of counsel at trial. On November 21, 1984, Cone filed an amended post-conviction petition, claiming that his prosecutors had engaged in misconduct and alleging additional instances of ineffective assistance of counsel. The state trial court held a hearing and denied Cone's petition.

Cone appealed that denial to the Tennessee Court of Criminal Appeals, and on November 4, 1987, that court affirmed.

On December 21, 1987, Cone sought permission to appeal to the Tennessee Supreme Court, raising only claims of prosecutorial misconduct and ineffective assistance of counsel, but his petition was denied.

B.

State Court Collateral Proceedings—Second Petition

On June 15, 1989, Cone, acting *pro se,* filed a second state post-conviction petition, and on June 22, 1989, an amended petition. The trial court dismissed the amended petition as barred by the successive petition restrictions of Tennessee's post-conviction statute. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Cone appealed, and on May 15, 1991, the Court of Criminal Appeals reversed and remanded the amended petition to the trial court to allow Cone to "rebut the presumption of waiver." A presumption of waiver arises under Tennessee law if a claim for relief is not asserted before a court of competent jurisdiction in which the claim could have been presented. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). On August 13, 1993 and October 5, 1993, Cone's postconviction counsel filed second and third amended petitions, alleging more ineffective assistance of counsel claims. Finally, on November 12, 1993, counsel filed a fourth amended petition.

The trial court, on remand, dismissed the amended petitions under Tenn. Code Ann. § 40-30-112(b), holding that all the grounds raised were barred because they had previously been determined or were waived. This judgment was affirmed by the Tennessee Court of Criminal Appeals, and the Tennessee

Supreme Court denied an application for permission to appeal.

Cone filed a motion for a rehearing, but it too was denied by the Tennessee Supreme Court. The United States Supreme Court denied Cone's petition for a writ of *certiorari*.

III.

Federal Court *Habeas* Petition

Cone then filed a motion in federal district court to stay his execution; the court granted the stay and permitted the filing of a *habeas* petition under 28 U.S.C. § 2254. On July 1, 1997, Cone filed a petition for a writ of *habeas corpus* in federal district court. On October 14, 1997, Cone filed motions for an evidentiary hearing and for discovery, but they were denied. The district court also denied the section 2254 petition, and further, denied a certificate of appealability, finding that an appeal would not be taken in good faith. The court also lifted the stay of execution, however, a new execution date was not set. This court then granted Cone's motion for a certificate of appealability.

We review *de novo* the district court's disposition of a petition for *habeas corpus*, but we review the district court's factual findings for clear error. *Carter v. Bell*, 218 F.3d 581, 590 (6th Cir.2000).

IV.

Federal *Habeas* and Tennessee Waiver

Before addressing the substance of Cone's several constitutional claims, it might be useful to review the

basis for this federal court's authority to examine the validity of a state court conviction.

A federal court may grant relief on a petition for a writ of *habeas corpus* only if the applicant has exhausted the remedies available in the state court. 28 U.S.C. § 2254(b)(1)(A) (West Supp. 2000). If the state court adjudicates and rejects a claim on adequate and independent state grounds, such as a state procedural rule that precludes adjudicating the claim on the merits, the petitioner is barred by this procedural default from seeking federal *habeas* review of such claim, unless the petitioner can show "cause and prejudice" for the default. *Coleman v. Thompson,* 501 U.S. 722, 750-51 (1991); *Wainwright v. Sykes,* 433 U.S. 72, 87-88 (1977).

However, there are several prerequisites before the cause and prejudice test is applied in a federal court to any kind of state procedural default. "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir.1986). "Second, the court must decide whether the state courts actually enforced the state procedural sanction." *Id.* Third, the procedural default must be an "independent and adequate" state ground on which the state can rely to foreclose review of a federal constitutional claim. *County Court of Ulster County, New York v. Allen,* 442 U.S. 140, 148 (1979). If these three prerequisites are met, a federal court must determine whether the petitioner is able to meet the cause and prejudice test to excuse the state procedural default.

The cause and prejudice standard is a two-part test in which the petitioner must: (1) present a substantial reason to excuse the default, *Coleman*, 501 U.S. at 754; and (2) show that he was actually prejudiced as a result of the claimed constitutional error, *United States v. Frady*, 456 U.S. 152, 167-69 (1982).

If the claims presented in the federal court were never actually presented in the state courts, but a state procedural rule now prohibits the state court from considering them, the claims are considered exhausted, but are procedurally barred. *Coleman*, 501 U.S. at 752-53.

Under Tennessee law at the time of Cone's conviction, grounds for relief that had been previously determined or waived were not cognizable in a state post-conviction action. Tenn. Code Ann. § 40-30-111 (1990) (since repealed). Moreover:

> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112 (1990) (since repealed).

A federal court will not grant *habeas corpus* relief unless the state adjudication of the federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (West Supp. 2000).

V.

The *Brady* Claim

The first of Cone's claims before us is his assertion that the state prosecutors withheld exculpatory documentary evidence from him in violation of the rule announced in *Brady v. Maryland,* 373 U.S. 83 (1963). The *Brady* rule requires the government "to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie,* 480 U.S. 39, 57 (1987). A *Brady* violation is grounds for setting aside a conviction or sentence only if the failure to declare the relevant material "undermines confidence in the verdict, because there is a reasonable probability that there would have been a different result had the evidence been disclosed." *Coe v. Bell,* 161 F.3d 320, 344 (6th Cir.1998), *cert. denied,* 528 U.S. 842 (1999).

The respondent argues that this claim has been procedurally defaulted under Tennessee law and therefore may not be entertained here. Cone argues that he has not procedurally defaulted his *Brady* claims because he was unable to raise the claims in his first and second petitions for post-conviction relief

because he did not then know the alleged *Brady* material existed. He also argues he has "cause" for any procedural default because some of the allegedly withheld documents were only recently available to him through discovery in 1997. He then proceeds to argue the merits of his *Brady* claim. Although it is a difficult question, we believe that Cone's claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. And even if that were not so, we are satisfied that the documents Cone complains were withheld are not *Brady* material.

A.

Cone claims the documents that were withheld by the state prosecutors fall into four groups: (1) evidence regarding his drug use; (2) evidence that might have been useful to impeach the testimony and credibility of Officer Ralph Roby; (3) FBI reports; and (4) evidence showing that the prosecution's witness, Ilene Blankman, was untruthful and biased. We will take up each category of documents separately and then discuss whether they are *Brady* material at all.

1.

First, Cone claims that the prosecution withheld several witnesses' statements which indicate that the prosecution knew about Cone's drug use. These include: a statement by Robert McKinney, who stated he was present at the time of the robbery, and that Cone "acted real weird" and appeared to be on drugs; statements from Charles and Debbie Slaughter that Cone "looked wild eyed" the day before the killings; a statement by Sergeant Grieco of the Pompano Beach, Florida, Police Department who described Cone as

looking "frenzied" and "agitated" a few days after the killings; and a statement from Chief Daniels of the Lake Village, Arkansas, Police Department who informed authorities that Cone "was a heavy drug user."

Cone claims that his "amphetamine psychosis" defense—essentially an insanity defense—was undercut because the prosecution withheld these documents from his examination. Each of the statements was part of the state District Attorney's files, except for Chief Daniels's statement. It is difficult to discern from the record whether Chief Daniels's statement was for certain in the DA's files, nevertheless, it appears to be part of it. However, in his petition for a writ of *habeas corpus,* Cone admits Chief Daniels's statement was indeed part of the DA's files and that he had access to the files in 1992. Cone claims to have been unaware of their existence until 1992. Whatever the date of his discovery of the existence of these documents, it is clear that Cone learned of these materials well before his second and third amended petitions were filed on August 13 and October 5, 1993, respectively.

A careful examination of the state court proceedings reveals that before filing his petition for a writ of *habeas corpus* in the federal court on July 1,1997, Cone three times raised a generalized claim in the state courts that the prosecution had withheld evidence. He raised the issue for the first time in his *pro se* amended petition for post-conviction review, dated June 1989, wherein he claimed that the prosecution had been withholding evidence. The Tennessee criminal court determined that the claim had been waived by failing to raise it in his direct

appeal. This determination was affirmed on appeal. Cone raised the issue again in his second amended petition for post-conviction relief in August 1993, and this time claimed somewhat more specifically, that the prosecution had withheld evidence regarding Ilene Blankman. Finally, Cone raised the issue in his third amended petition for post-conviction relief in October 1993; this time his claim was that the state withheld exculpatory evidence that it knew of Cone's drug problem. This evidence, he claimed, included the statements by Charles and Debbie Slaughter, among others. The August 13, 1993 and October 5, 1993, amended petitions were dismissed by the trial court, which found that the claims had been previously determined or waived. This was affirmed on appeal. *Cone v. State*, 927 S.W.2d 579 (Tenn.Crim.App.1995).

Although Cone is correct in his argument that he in fact raised in the state court this first of his four *Brady* claims—that the prosecution withheld evidence that the state knew of his drug use—and therefore, that this claim was exhausted, we may not review a claim that has been decided in the state court on an "independent and adequate" state ground, as was the case here. The independent and adequate state ground in this instance is the state court's finding that Cone's claims were previously determined or waived under Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Thus, this first of Cone's four-part *Brady* claim is procedurally defaulted.

In addition, even if Chief Daniels's statement were not part of the DA's files, and Cone did not have access to it, it is not *Brady* material. The statement that Cone "was a heavy drug user" does not undermine our confidence in the verdict such that a reasonable

probability exists that the verdict would have been different, because of the overwhelming evidence of Cone's guilt.

2.

The second of Cone's *Brady* claims is that the prosecution withheld evidence that Cone might have used to impeach the credibility of Officer Roby. According to Cone's interpretation of Officer Roby's testimony, the officer testified that there was no evidence that Cone had used drugs. According to Cone, the documents withheld from him included an All Points Bulletin sent out by Officer Roby, in which Roby warns the nation that Cone is not only a "drug user," but a "heavy drug user," and evidence that Cone's sister told Officer Roby that Cone had a "severe psychological problem" and "needed to work on his drug problem." Cone claims these two pieces of evidence show the falsity of Officer Roby's testimony that Cone was not a drug user. These two items of evidence were indeed part of the state DA's files and arguably fall within Cone's claim that the state withheld exculpatory evidence regarding his drug use, a claim he raised in his third amended petition for post-conviction relief.

The state court ruled that the claim had been previously determined or waived by Cone's failure to raise it earlier. This determination was affirmed on appeal. *Cone*, 927 S.W.2d 579. Again, we will not review a claim that has been determined under an independent and adequate state ground, and therefore this claim, likewise, is procedurally defaulted.

3.

Cone's third *Brady* claim is that certain FBI reports were withheld from him. He argues that several documents demonstrate that the FBI knew he had a severe drug problem, and that had Cone known of these documents at trial, he might have used them to impeach FBI Agent Eugene Flynn's testimony that Cone was not insane. The evidence included a nationwide FBI alert indicating Cone was a heavy drug user and an FBI document showing Cone was in possession of amphetamines in the late 1970s. In addition, Cone complains that Agent Flynn had access to a report prepared by a witness, Dr. Jonathan Lipman, who testified against Cone. Cone claims that the presence of Dr. Lipman's report in the FBI files demonstrates that Dr. Lipman was not a disinterested witness.

It appears that Cone did not make a request for the FBI documents until after he filed his second petition for post-conviction review and then he requested only FBI reports regarding himself and Ilene Blankman. His request did not refer to Dr. Lipman's report. It further appears that all of this evidence was in the DA's files and could have been discovered by Cone in 1992. He could have raised this claim in the state court in 1993, however, he did not do so. Because this claim regarding the FBI materials and Dr. Lipman's report was not raised in the state court when Cone had the opportunity to do so, it is procedurally defaulted.

4.

Cone's fourth *Brady* claim is that the prosecutors withheld evidence that Cone might have used to impeach the testimony of prosecution witness Ilene

Blankman. This witness testified at trial that Cone had never used drugs in her presence. The withheld evidence, according to Cone, is that the prosecution's file showed that the prosecutors had ongoing contact with Blankman, took her to dinner, and sent her a thank you letter after the trial was concluded and Cone was sentenced. This "withheld" evidence, Cone argues, might have been useful to impeach Blankman's credibility by showing her bias. As to whether Cone has exhausted this claim, it is true that he alleged in his second amended petition that the prosecution had withheld exculpatory evidence regarding Ilene Blankman. But the state court found that claim waived for not being raised earlier. Again, we do not review a claim that has been determined under an "independent and adequate" state ground, and thus it is procedurally defaulted. We conclude that Cone has procedurally defaulted all four of his *Brady* claims.

B.

We must now inquire whether Cone has made a sufficient showing under the familiar "cause and prejudice" standard to excuse his procedural default. We first determine whether the three prerequisites to application of the cause and prejudice test have been established. We think they have. To repeat, they are: (1) that there is a state procedural rule applicable to Cone's claim and that he failed to comply with it; (2) that the state actually enforced the state rule; and (3) that Cone's noncompliance with the rule is an independent and adequate state ground for denying state review of a constitutional claim. *Maupin,* 785 F.2d at 138. As to the first requirement, the Tennessee waiver rule is plainly applicable to Cone's *Brady*

claims; second, the Tennessee courts explicitly relied upon the waiver rule when deciding whether to consider Cone's post-conviction *Brady* claims; and third, the state's legitimate interest in requiring a defendant to raise all the claims he has at one time, thus avoiding multiple bites at the apple, is an independent and adequate state ground.

We are satisfied that Cone's *Brady* claims have been procedurally defaulted in the Tennessee courts, and so the next question is whether Cone has established cause and prejudice sufficient to excuse his procedural default. Cone must show that there is a reasonable cause for his failing to raise these claims timely, and if he makes that showing, that withholding the documents unfairly prejudiced him.

It is remarkable and significant that Cone does not argue in his brief before this court that there is a justifiable *cause* for his failure to raise his first, second, and fourth *Brady* claims in a timely manner in the state courts. Instead, he argues the merits of the claims. Cone's only mention in this court of his procedural default with respect to these three *Brady* claims appears in his reply brief, wherein he simply asserts that he raised the claims in state court and thus they are *not* procedurally defaulted, a position contradicted by the findings of the Tennessee courts and by the record.

Moreover, but not surprisingly, Cone does not argue the prejudice prong of the cause and prejudice test. According to *Frady*, 456 U.S. 152, "a convicted defendant must show *both* (1) 'cause' excusing his TTT procedural default, *and* (2) 'actual prejudice' resulting from the errors of which he complains." *Id.* at 168

(emphasis added). Therefore, we have no occasion to consider whether Cone's procedural default with respect to the first, second, and fourth of his *Brady* claims is excused under the cause and prejudice standard and thus no authority to consider the claims on the merits.

Cone's third *Brady* claim, that FBI documents were allegedly withheld, was indeed raised, but only in Cone's petition for a writ of *habeas corpus* in the federal court; it was never raised in the state court. Cone argues that there is no state court procedural default with respect to this claim because the FBI records are privileged and were made available to him only through discovery granted by the federal district court in 1997, and thus he could not have successfully requested them in a timely fashion. Assuming without deciding that Cone has reasonable cause for not raising this issue timely in his state post-conviction proceedings (because he did not learn of the FBI records until 1997), the fact remains that he makes no argument that he was *prejudiced* as a result of the government's failure to disclose to him the existence of the FBI documents, and thus he completely ignores the prejudice prong of the cause and prejudice standard. We are satisfied that because he did not raise this claim in the state court and has not made a showing under the prejudice prong of the cause and prejudice standard that would excuse his default, we may not now review this claim.

In conclusion, Cone's default in failing to raise these claims in the state court and further default in failing in the federal court to justify that failure forecloses us from reaching the merits of those claims.

VI.

Jury Instructions

Cone claims he was denied a fair trial because the trial court's jury instructions unconstitutionally equated "reasonable doubt" with "moral certainty." The challenged instruction was as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

Although Cone admits that the reasonable doubt instruction in his case was "similar" to the instruction given and approved in *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997), he alleges that he received an additional instruction that made the instructions, when taken as a whole, unconstitutional. The additional instruction stated:

> It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to satisfy the jury beyond a reasonable doubt of all the facts necessary to constitute the crime charged. Before a verdict of guilty is justified, the circumstances, taken together, must be of a

> conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a moral certainty that the defendant, and no one else, committed the offense.

The Tennessee Court of Criminal Appeals determined that since Cone did not raise the reasonable doubt argument until his second post-conviction petition, he had defaulted this claim. The court determined that Cone should not be able to "delay the administration of justice *ad infinitum* by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed." *Cone,* 927 S.W.2d at 582. This is an independent and adequate ground that bars the consideration of these claims in this court. *Wainwright,* 433 U.S. at 87-88.

Cone argues that his jury instruction claim is not procedurally defaulted for three reasons. First, he violated no "clearly established" rule when he presented his claim in his second post-conviction petition, where he did not "knowingly and understandingly" fail to present the claim earlier, as required by Tenn.Code Ann. § 40-30-112(b). Second, he could not have defaulted his claim because there is no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Third, he has "cause" for failing to raise the claim earlier because he did not have effective trial or appellate counsel.

Assuming without deciding that Cone has not procedurally defaulted his claim, or, if he has, he can show cause and prejudice, his claim is meritless. A

nearly identical instruction has been approved by this court in *Austin*, 126 F.3d at 846. The instructions, taken together and in the context in which they were given, did not allow the jury to convict in order to reach a mere "satisfactory conclusion," as Cone suggests. *See Victor v. Nebraska*, 511 U.S. 1, 16 (1994).

VII.

Other Claims

We find no fault with the district court's dismissal of the claim of prosecutorial misconduct. Cone claims that the prosecution's closing argument in the guilt phase of the trial was improper and that it undercut Cone's amphetamine psychosis defense. The prosecution's argument was that the money found in Cone's car suggested that Cone was a drug seller, not a drug user. This, despite the fact that the prosecution knew that most of the money was stolen from a supermarket during Cone's crime spree.

Cone first raised this prosecutorial claim in the context of an ineffective assistance of counsel claim. The Tennessee Court of Criminal Appeals rejected the claim that the prosecution's argument affected the outcome of the trial when it rejected his first petition for post-conviction relief. *Cone v. State*, 747 S.W.2d 353, 355 (Tenn. Crim. App. 1987).

Cone next raised the claim in his second petition for post-conviction relief. The Tennessee Court of Criminal Appeals determined that Cone's claims had been either previously determined or waived. *Cone*, 927 S.W.2d 579.

In Cone's *habeas* petition, the federal district

court determined that this claim was without merit. The court found that this argument exaggerated the importance of the prosecutor's statement and ignored the fact that there was other evidence that Cone was indeed using drugs. Cone did not convince the district court that the state court's rejection of this claim "involved an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States" under section 2254(d)(1). Rather, the district court determined that Cone's "out-of-his-mind-on-amphetamines" defense was not rejected by the jury because the prosecutor accused him of being a drug seller, but because Cone failed to present credible evidence that he had actually abused amphetamines at any time close to the murders.

In order to make a claim for prosecutorial misconduct, a defendant must demonstrate that: "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Coe,* 161 F.3d at 343.

We find that the statements made by the prosecutor referring to Cone as a drug seller are not material, and we agree with the district court that the statement was too remote from the real issues in this case to have affected the jury's deliberations. Cone's drug psychosis defense was not substantially undercut by the prosecutor's remarks; rather, Cone simply did not present credible evidence that he was using drugs at the time he committed the murders. Under 28 U.S.C. § 2254(d), this decision does not appear to be contrary to, or involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

VIII.

Malice Instruction

Cone also claims that he was denied due process in that the state trial judge's instruction on malice was erroneous and unconstitutionally shifted the burden of proving this element to Cone.

Cone first raised a challenge to these instructions in his second petition for postconviction relief. The Tennessee Court of Criminal Appeals determined that the claim had been previously determined or waived by failure to raise it earlier.

In Cone's petition for a writ of *habeas corpus,* Cone raised this issue again. However, the district court determined that this claim was procedurally defaulted. It based its decision on a procedurally similar case, *Coe,* 161 F.3d 320. In that case, the Sixth Circuit determined that the state rule was an independent and adequate ground that barred relief in this court, where the petitioner raised his claim in his second petition for post-conviction relief only, and the state court determined that his claim was previously determined or waived. In this case, the district court relied on the finding of the Tennessee Court of Criminal Appeals that Cone raised this claim in his second petition for post-conviction relief only and thus his claim was previously determined or waived. According to *Coe,* the Court of Criminal Appeals' decision constitutes an independent and adequate ground that bars the consideration of these claims in the district court.

We agree with the district court and find that this claim is procedurally defaulted on an independent and

adequate state ground. However, if Cone is able to demonstrate cause and prejudice, his default would be excused.

Cone argues that even if he did fail to raise timely his claim of an erroneous jury instruction on malice, he has not defaulted the claim for several reasons. First, he did not give a personal "knowing[ ] and understanding[ ]" waiver, as required by the Tennessee statute, since he is not chargeable for any waiver made by his attorney. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Second, he argues that his claim cannot be defaulted because there can be no procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Third, Cone claims that during the time of his state petitions for post-conviction relief, Tennessee law was in a state of confusion as to whether an "objective" or "subjective" standard was to be used in determining whether a claim was waived. Cone does not clearly explain his understanding of the difference between the "objective" and "subjective" standards to which he refers, and we do not find these terms helpful.

First, we are aware of two cases in which courts have considered whether a petitioner is bound by his attorney's waiver of a constitutional claim, *Coe*, 161 F.3d 320, and *House v. State*, 911 S.W.2d 705 (Tenn. 1995). The *House* court stated that "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." *House*, 911 S.W.2d at 714. *House* does not appear to announce a new standard, as Cone suggests. Rather, it seems merely to affirm Tennessee's standard of waiver.

> In *Coe*, as we explained earlier, this court held that the petitioner had procedurally defaulted his state claim that the trial court failed to give a correct malice instruction. He presented the claim for the first time in his second petition for post-conviction relief rather than his first petition, as a consequence of which the Tennessee Court of Criminal Appeals found it had been procedurally waived.

Coe, 161 F.3d at 329-31. This court cited *House* when determining that Coe had defaulted his claim under an "objective" standard of waiver. However, the petition upon which the court relied in finding the default was filed before *House* was decided. Thus, concerning defaults that occurred before *House* was decided, the Tennessee courts have strictly and regularly applied the traditional standard of waiver, whether the waiver is made by counsel or the petitioner personally.

The cases that Cone cites to support his position that a petitioner must "knowingly and understandingly" waive a constitutional right are not helpful because they are distinguishable from his case. Those cases are either: (1) unpublished (*Richardson v. Dutton*, No. 86-5437, 1987 WL 38229 (6th Cir. Nov. 18, 1987)); (2) determined after Cone filed his petition and thus he could not have relied on them (*Wooden v. State*, 898 S.W.2d 752 (Tenn. Crim. App. 1994), *Johnson v. State*, No. 02C01-9111-CR- 00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994)); or (3) hold that a petitioner did not personally waive claims by not raising them earlier on the ground that the petitioner did not have counsel at the time (*Swanson v. State*, 749 S.W.2d 731 (Tenn. 1988), *Freeman v. State*, No. 70, 1988 WL 94769 (Tenn. Crim. App. Sept.

14, 1988)).

Cone's second reason why his claim cannot be defaulted also fails. He claims that there can be no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).

This is, essentially, an argument that the state ground is not considered adequate unless the procedural rule is strictly and regularly followed. *Id.* However, as explained in *Coe*, the Tennessee courts have strictly, regularly, and consistently followed the waiver rule in similar cases. *Coe*, 161 F.3d at 331.

Last, we are not persuaded that Cone is correct in his claim that Tennessee law was in a state of confusion on whether an "objective" or "subjective" standard of waiver is appropriate. It is not clear from the Tennessee cases that procedural default may not be charged to a petitioner who has not himself "knowingly and understandingly" waived timely assertion of a federal constitutional claim when his attorney has done so. We are satisfied that Tennessee follows the traditional rule that a petitioner is chargeable with his attorney's failure to timely assert a claim and with the consequences of failing to do so.

In one sentence, Cone claims that an additional cause for his failure to raise the malice instruction issue in the state court is the ineffectiveness of his state counsel. Cone makes no argument, factual or legal, in support of his assertion, but newly instructs the reader to "*See* pp. 56-58, supra." Reference to those pages indicates that Cone appears to be incorporating by reference his earlier argument with respect to the

defaulted reasonable doubt/moral certainty instructional issue, that "trial and appellate counsel TTT may have been ineffective" because in the state court appeal, weaker legal issues were raised and "this was counsel['s] first capital trial and appeal."

Although it is well settled that the ineffective assistance of trial or appellate counsel may be cause sufficient to excuse a procedural default in raising a federal constitutional issue in state court, it is also settled that the petitioner must show both cause and prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51; *Frady*, 456 U.S. at 168-69. In this instance, while Cone claims ineffectiveness of counsel as the cause for his default, he does not claim any prejudice; he makes no mention of the prejudice prong of the cause and prejudice test at all.

For that reason alone, we would be justified in rejecting his ineffectiveness-of-counsel-as-cause argument. *See Frady*, 456 U.S. at 170. But Cone's argument fails for the more fundamental reason that he has not shown that his state counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Cone must show that in failing to raise the malice instruction issue in the state court, his "counsel's performance was deficient," which requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Cone has utterly failed to meet the requirements of *Strickland* with respect to this issue. In the first place, he makes no independent argument, factual or legal, relating to his failure to raise the malice

instruction issue in the state court of his attorney's performance. He merely invites us to "see" his argument that his counsel was constitutionally ineffective for failing to raise an altogether different instructional issue because "weaker" issues were raised and it was counsel's first capital case. Succinctly put, this sort of parenthetical instruction to this court to piece together a constitutional claim of ineffectiveness of counsel from the language Cone used in presenting the claim with a different instructional issue early in his brief does not meet his obligation under *Strickland*. Even if we were to heed Cone's instruction to us to assemble his ineffective assistance of counsel argument for him, the argument would fail because (1) counsel's failure to raise every conceivable issue on appeal that might have been raised, even issues arguably stronger than those that were raised, and (2) handling one's first capital case, are not, *per se*, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

In addition, as we have said, Cone makes no claim whatever that he was prejudiced as a result of the trial court's malice instruction.

For these reasons, Cone has not satisfied his burden under the cause and prejudice test, and we may not therefore reach the procedurally defaulted malice instruction issue.

IX.

Cruel and Unusual Punishment

We decline to address Cone's Eighth Amendment cruel and unusual punishment argument and his

argument concerning the application of aggravating circumstances because we have vacated the death sentence for the reasons set forth below.

X.

The Death Sentence

Cone argues that his death sentence must be vacated because he was denied the effective assistance of counsel at his sentencing as guaranteed by the Sixth Amendment. He claims that at sentencing his counsel offered no evidence whatever in mitigation and made no argument of any sort prior to sentencing. We agree that Cone was denied the effective assistance of counsel, and accordingly, we must vacate his death sentence.

Before going to the merits of this issue, it is appropriate to describe its procedural route to this court. Cone raised the issue of the ineffectiveness of his counsel at sentencing in his first petition for post-conviction relief, arguing that his trial counsel was ineffective for failing to present mitigating evidence at the sentencing phase of the trial and for waiving final argument. The Tennessee court determined that the attorney's silence at Cone's sentencing was not ineffective assistance because it was part of the attorney's "strategy" to prevent the prosecutor from making a "devastating" closing argument, for which he was apparently well-known. The trial court stated, in its September 19, 1986, opinion on Cone's first petition for post-conviction relief:

> This Court finds from the facts and circumstances that [defense counsel] put a great deal of thought and preparation in this

> case; further, he pointed out he interviewed numerous family members and relatives whose testimony was contradictory and generally not helpful. He said his strategy was to get as much mitigation in during the guilt/innocence phase as he could. It is the opinion of this Court that the defense attorney's performance, including his decision not to introduce any evidence in mitigation, did not fall below the objective standard of reasonableness set by the Sixth Amendment's guarantee of the effective assistance of counsel . . . .
>
> In reference to the waiver of final argument in the penalty phase it was clear [from] testimony from the record that this was strategy on the part of defense counsel, in view of the prosecutor's . . . . reputation for devastating closing arguments.

This decision was affirmed on appeal to the Tennessee Court of Criminal Appeals, which stated in part:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective

assistance.

Cone, 747 S.W.2d at 357.

Cone raised this issue again in his second petition for post-conviction relief. At that time, the Tennessee court determined that the claim was either previously determined or waived and the court dismissed it. On appeal, the Tennessee Court of Criminal Appeals reversed. The court cited *Swanson*, 749 S.W.2d 731, for the proposition that a petition for post-conviction relief, which stated a colorable claim for relief, should not be dismissed as having been waived without an opportunity to show the lack of waiver, unless waiver is clear. The court remanded the case to allow Cone to "rebut the presumption of waiver." However, on remand, the trial court determined that all of Cone's ineffective assistance of counsel claims—those relating to the guilt phase and those relating to the sentencing phase—should be considered as one claim.

Cone raised the issue for the third time in his petition for a writ of *habeas corpus* in the federal district court. The respondent does not argue that Cone's ineffective assistance of counsel claim based on the lack of mitigating evidence at sentencing and the failure to make a final argument is procedurally defaulted. Therefore, the claim is properly before us.

A claim of ineffective assistance of counsel presents mixed questions of law and fact which this court reviews *de novo*. *United States v. Jackson*, 181 F.3d 740, 744 (6th Cir. 1999). To repeat, in order to succeed on an ineffective assistance of counsel claim, a petitioner must show:

First, . . . that counsel's performance was

> deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Under the first prong of *Strickland,* we must determine whether Cone's counsel, in remaining completely silent during the sentencing phase of the trial, except to declare that he "rested"—offering no evidence in mitigation and declining to address the court and jury—acted within an objective standard of reasonableness. *Olden v. United States,* 224 F.3d 561, 565 (6th Cir. 2000). If he did not, we must then turn to the second prong of *Strickland* and determine whether the petitioner has demonstrated a reasonable probability that he would not have been sentenced to death but for his counsel's failure. *Strickland,* 466 U.S. at 693-94.

In an appropriate case, *Strickland*'s prejudice prong may be presumed. *United States v. Cronic,* 466 U.S. 648 (1984).

The right to the effective assistance of

> counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing .... But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. at 656-57.

For example: "[I]f the accused is denied counsel at a critical stage of his trial [or] ... if counsel *entirely fails* to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659, (emphasis added) (footnote omitted). In such a case, it is not necessary to demonstrate actual prejudice. *Rickman v. Bell*, 131 F.3d 1150, 1155 (6th Cir. 1997). Moreover, a defendant may demonstrate the "constructive" denial of counsel when, although counsel is present, "'the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided.'" *Cronic*, 466 U.S. at 654 n. 11 (quoting *United States v. Decoster*, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring)).

Whether the failure to introduce any mitigating evidence and the waiver of final argument in the sentencing phase of a death penalty case constitute ineffective assistance of counsel must be determined on a case-by-case basis. The failure to present mitigating evidence in a death penalty case does not necessarily constitute ineffective assistance of counsel, *see Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986); *see also Moore v. Reynolds*, 153 F.3d 1086, 1105 (10th Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999), although

given the uniqueness of the death sentence, the absence of any mitigating evidence, combined with a waiver of oral argument, plainly raises a "red flag." When the waiver of final argument is part of a legitimate trial strategy, great latitude is given to the decision of the attorney. *Moore,* 153 F.3d at 1104.

However, where the waiver is not based on a sentencing strategy, or is based upon a decision called "strategy" which no reasonable observer could credit as involving any logically defendable analysis, the attorney may have performed in a deficient manner. *Smith v. Stewart,* 140 F.3d 1263, 1269 (9th Cir. 1998). An attorney's decision to present no evidence whatever in mitigation and, *in addition,* to offer no argument when his client faces the prospect of being sentenced to death may amount to a virtual abandonment of the adversarial process that results in injustice, thus demonstrating both deficient performance and prejudice. *Kubat v. Thieret,* 867 F.2d 351, 368-70 (7th Cir. 1989).

This court has found that counsel's failure "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that [defendant's] death sentence was not reliable." *Austin,* 126 F.3d at 848. Where mitigating evidence was available, but not adequately investigated and not presented at sentencing, this "does not reflect a strategic decision, but rather an abdication of advocacy." *Id.* at 849.

It is indisputable that Cone's trial attorney presented no mitigating evidence at all and made no final argument; he did not even ask the jury to spare his client's life. However, Cone's attorney testified at

the post-conviction hearing that he had several strategic reasons why he decided to waive final argument, admittedly a "radical tactic" at the penalty phase of a capital case. First, he thought that he had presented to the jury during the guilt phase almost every mitigating circumstance available. He claimed that since the jury is charged to consider those factors in its penalty phase deliberations, he did not have to put the evidence on a second time. Second, he claims that he "sucker[ed]" the prosecution into putting on mitigating evidence of Cone's Bronze Star decoration from Vietnam without having Cone testify. Third, he claims he thought the trial judge had "lost control" of the case. Fourth, he claims that Cone told him he would "explode" if he got on the stand. Fifth, he explained that he made his penalty phase "closing argument" in his opening statement during the guilt phase, and therefore, did not need to make a closing argument. Sixth, he explained his use of a rather confusing and convoluted theory on how he planned to get the jury to find an illegal aggravating circumstance, which would be the basis for later having the whole penalty phase thrown out. Last, he claimed that he wanted to prevent the prosecutor from making one of his notorious "devastating" closing arguments.

While these post hoc justifications, given in testimony at Cone's post-conviction hearing, surely amount to *explanations* for counsel's silence at sentencing and may have been "tactical" decisions, they do not necessarily defeat Cone's claim that his attorney's refusal to plead for Cone's life amounted to constitutional ineffectiveness.

A trial lawyer accused of constitutional

ineffectiveness for failing to act where action is ordinarily indicated will almost always have a reason for declining to act. The reason will usually be called the lawyer's "strategy." But the noun "strategy" is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result," Random House Dictionary 1298 (Rev.ed.1975), must be reasonable. It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney handling a death penalty case would assess as reasonable to achieve a "specific goal."

Here, the goal, the only conceivable goal, was to persuade the jurors not to sentence Cone to death. How counsel's refusal even to ask the jurors to do that could be called a reasonable strategy to achieve the goal, eludes us.

Even if we add up all of counsel's claimed strategic tactics, only one of which was apparently credited by the Tennessee appellate courts and the district court below—avoiding a "devastating" argument by the prosecutor—we think a reasonable attorney would have realized the absolute necessity of arguing for his client's life by making a closing argument. In addition, counsel had plenty of mitigating evidence at his fingertips; yet he failed to present it at the sentencing phase.

We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not

making a final argument in a death penalty case is a justifiable "strategy" because doing so might trigger a "devastating" response by the prosecutor—the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a "devastating" argument by the prosecutor than if he were sentenced to death after the prosecutor's "mild" request that he be sentenced to death, which was followed by his own attorney's silence? Or, asked differently: How much more devastating for the petitioner could the prosecutor's "devastating" argument have been than the death sentence the petitioner got without such argument?

We can only imagine the effect on the jurors when Cone's defense counsel refused even to ask them to spare his client's life. They could only have inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death. *See Stewart,* 140 F.3d at 1270. Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death. When a man faces the gallows and his attorney sitting next to him declines even to ask the jurors to spare his life in the name of simple mercy, the attorney ought to have a most compelling reason for failing to speak-one that would incline a reasonable observer to credit as a sentencing strategy that is legally and factually justified. The reasons Cone's counsel has given are totally unreasonable, given the stakes. This was not

"strategic" representation; it was nonrepresentation of the most deadly sort.

Under *Cronic,* a presumption of prejudice is raised by counsel's behavior; thus, Cone need not show actual prejudice. Essentially, Cone did not have counsel during the sentencing phase of his trial and thus the prosecutor's insistence that justice required that Cone be put to death was not subjected to "meaningful adversarial testing." *Cronic,* 466 U.S. at 656. We find that counsel's abandonment of Cone at possibly the most "critical stage of his trial" fell below an objective standard of reasonableness and prejudiced him, which resulted in the ineffective assistance of counsel under the Sixth Amendment. *Id.* at 659.

But the state of Tennessee has held that Cone's lawyer's behavior was not ineffective under *Strickland* and we may not disturb that ruling unless we are convinced that it constitutes a "decision that is contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). We conclude that Cone's counsel's refusal to offer any evidence in mitigation and refusal even to address the jurors to ask them to spare Cone's life because counsel feared the prosecutor might make a "devastating" argument denied Cone his Sixth Amendment right to counsel at sentencing and that the Tennessee court's conclusion to the contrary is an unreasonable application of the clearly established law announced by the Supreme Court in *Strickland.*

XI.

Conclusion

We **AFFIRM** the district court's refusal to issue a writ of *habeas corpus* with respect to the petitioner's conviction, but we **REVERSE** the district court's judgment as to the petitioner's sentence. We **REMAND** to the district court with instructions to issue a writ of *habeas corpus* vacating the petitioner's death sentence due to the ineffective assistance of counsel at sentencing, unless the state conducts a new penalty phase proceeding within 180 days after remand.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE,	x	
	x	
Petitioner,	x	
vs.	x	No. 97-2312-M1/A
	x	
RICKY BELL,	x	
Respondent.	x	

ORDER DENYING MOTION FOR
EVIDENTIARY HEARING
AND
ORDER OF PARTIAL DISMISSAL

(Filed May 15, 1998)

I. INTRODUCTION

This matter is before the Court on petitioner's Motion for Evidentiary Hearing, filed October 14, 1997. Petitioner, Gary Bradford Cone, an inmate at Riverbend Maximum Security Facility in Nashville, Tennessee, filed a habeas petition pursuant to 28 U.S.C. § 2254, attacking his state conviction of two counts of first degree murder, and the death penalty imposed for those crimes. The respondent warden has filed an answer raising various grounds for dismissing the petition, and the petitioner has filed a motion for an evidentiary hearing as to certain claims. For the reasons set forth below, petitioner's motion is DENIED and the claims addressed in his motion are

DISMISSED.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 5/18/98.

II. STATE COURT PROCEDURAL HISTORY

A. *Facts of the Crime*

Examination of the record reveals the following undisputed facts. On Saturday, August 9, 1980, Cone robbed a jewelry store in Memphis, Tennessee of about $112,000 worth of expensive watches, rings and other jewelry. Shortly after the robbery, police received a description of the robber from. the store manager, spotted petitioner driving his 1972 gray Oldsmobile; and followed him at a normal speed. The suspect became alarmed and led police on a high-speed chase through mid-town Memphis and into a residential neighborhood. There he abandoned his automobile, shot pursuing police officer B. C. Allen, and a citizen, John Douglas Clark, who challenged him, and tried to shoot a third citizen, Herschel Dalton, when Dalton refused to give Cone his cat During the afternoon of August 9, 1980, police seized Cone's car, but he eluded them only to resurface early the next morning in the same neighborhood at the door of Lucille Tuech's apartment. She refused him admittance to make a telephone call and he drew a pistol on her. In the meantime the police had inventoried the car's contents and discovered a large amount of cash, some of which was later attributed to an earlier robbery of a grocery store, an enormous quantity of drugs, and the jewelry store's stolen property.

On the afternoon of Sunday, August 10, 1980, Cone broke through the rear door of the nearby home of an elderly couple, Shipley O. Todd and his wife, Cleopatra Todd. Mr. Todd was 93 years old and his wife was 79. Cone attempted to coerce them into helping him, and then killed them when they stopped cooperating with him. After the murders, relatives of the Todds became concerned because they were unable to contact the Todds at their home. Three days after the murders, the bodies of Mr. and Mrs. Todd were found in their home, horribly mutilated and cruelly beaten. The police found Cone's fingerprints and hair samples in the ransacked home. Cone then went to the airport and flew from Memphis to Florida, where he appeared at the home of an acquaintance on August 12, 1980. Cone was thereafter arrested on charges in Florida, and the Memphis police investigation led to his arrest and return to Tennessee on charges arising out of the August 9-10, 1980 crimes.

B. *Petitioner's State Court Trial Proceedings*

On August 19, 1980, a Shelby County Grand Jury indicted Cone for first degree murder in the perpetration of a burglary and first degree murder in the death of Shipley Todd, (case number B-74703), and first degree murder in the perpetration of a burglary and first degree murder in the death of Cleopatra Todd, (case number B-74702). See Addendum 1, Document 1, (State Court Record), at 2-8. On September 5, 1980, the grand jury indicted Cone for assault with intent to commit murder in the first degree against Dalton, (case number B-74898), assault with intent to commit murder in the first degree against Officer Allen, (case number B-74898), assault with intent to commit murder in the first degree

against Clark (case number B-74899), and robbery with a deadly weapon of the jewelry store, (case number B-74902). *Id.* at 11-19.

From April 14 to 23, 1982, Criminal Court Judge James C. Beasley, Sr., presided at a jury trial, which concluded with the jury finding Cone guilty on all charges and sentencing him to 10 to 25 years on the assaults, life imprisonment on the robbery, and death on the two murder indictments. *Id.* at 165-68. Cone appealed as of right to the Tennessee Supreme Court, which affirmed the conviction and sentence. *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984), *cert. denied*, *Cone v. Tennessee*, 467 U.S. 1210 (1984). Addendum 1, Docs. 4, 7.

C. *State Court Collateral Proceedings — First Petition*

On June 22, 1984, Cone filed, through counsel, his first post-conviction petition attacking the conviction and death sentence. In that petition, he contended his rights had been violated under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and under various state laws, rules of court, and constitutional provisions. In particular, he claimed that his attorney had provided ineffective assistance of counsel by failing to: 1) advise him properly; 2) make timely objections; 3) conduct adequate voir dire of the jury; or 4) discuss penalty stage strategy. Addendum 2, Doc. 1 at 27-29.

On November 21, 1984, Cone's post-conviction counsel filed an amended petition claiming that the prosecutors engaged in misconduct during the closing

arguments of the guilt phase of Cone's trial by arguing that the jurors should reject Cone's drug-user defense[1] because the amount of money in the car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery. The amended petition further claimed that petitioner's trial counsel provided ineffective assistance by:

1) failing to offer proof of mitigating circumstances during the penalty phase of the murder trial; First Post-Conviction Petition, ¶ 11(a), Adden. 2, Doc. 1 at 51;

2) failing to make a closing argument during the penalty phase of the murder trial; First Post-Conviction Petition, ¶ 11(a), Adden. 2, Doc. 1 at 51;

3) failing to advise Cone regarding whether any privilege protected statements he made during examinations by Dr. Bursten, a state psychiatrist; First Post-Conviction Petition, ¶ 11(e), Adden. 2, Doc. 1 at 52;

4) failing to adequately investigate Cone's background and personal and medical history for mitigating evidence; First Post-Conviction Petition, ¶ 11(d), Adden. 2, Doc. 1 at 52;

5) failing to adequately advise Cone regarding his decision not to testify at either the guilt or penalty phase of the trial; First Post-Conviction Petition, ¶ 11(c), Adden. 2, Doc. 1 at 51.

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[1] Cone's defense was "amphetamine psychosis."

The state court held a hearing, and on September 19, 1986, denied Cone's petition. *See* Adden. 2, Doc. 1 at 105. Cone then appealed to the Tennessee Court of Criminal Appeals, claiming, *inter alia*, that counsel provided ineffective assistance:

1) by failing to offer proof of mitigating circumstances during the penalty phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)4, Adden. 2, Doc. 2 at 26;

2) by failing to make a closing argument during the penalty phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)5, Adden. 2, Doc. 2 at 28; and

3) by failing to conduct adequate cross-examination of the State's expert witnesses during the guilt phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)3, Adden. 2, Doc. 2 at 25.

He also raised the claim that the prosecutors engaged in misconduct during the closing arguments of the guilt phase by arguing that jurors should reject Cone's drug-user defense because the amount of money in the car tended to show that he was a drug seller, not a drug user. First Post-Conviction Petition Appellate Brief, ¶ I, Adden. 2, Doc. 2 at 12.

On November 4, 1987, the Court of Criminal Appeals rejected these claims and affirmed. Adden. 2, Doc. 4. On December 21, 1987, Petitioner, through counsel, sought permission to appeal to the Tennessee Supreme Court, raising only the claims of prosecutorial misconduct, and if ineffective assistance

based on counsel's failure to present proof of mitigation and failure to make a closing argument during the penalty phase of the murder trial. Adden. 2, Doc. 5. On March 14, 1988, the Tennessee Supreme Court denied permission to appeal. Adden. 2, Doc. 7.

D. *State Collateral Proceedings — Second Petition*

On June 15, 1989, Cone filed, *pro se*, a second state post-conviction petition. On June 22, 1989, Cone filed a *pro se* amended petition. The trial court dismissed the petition as barred by the successive petition restrictions of Tennessee's post-conviction statute. On May 15, 1991, the Court of Criminal Appeals reversed, however, and remanded to permit Cone an opportunity to rebut the presumption of waiver. Adden. 3, Doc. 4.

On August 13, 1993, Cone's post-conviction counsel filed a second amended petition raising 35 claims of ineffective assistance of counsel.[2] On October 5, 1993, counsel filed a third amended petition, raising claims which were numbered 41 through 52. Claim 41 contended that the State had withheld exculpatory evidence tending to prove that Cone did suffer from drug-induced psychosis. Claim 44 contended that Cone's trial counsel provided ineffective assistance by failing to offer any proof of mitigating circumstances during the sentencing hearing. Claim 47 contended that the trial court violated Cone's Sixth Amendment rights by refusing to permit him to sit at counsel table

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[2] A table comparing the ineffective assistance claims raised in Cone's post-conviction petition and this federal petition is attached as an Exhibit to this order.

with his attorney during trial. Claim 48 contended that counsel provided ineffective assistance by improperly cross-examining the state's medical expert witnesses, and that Cone had been denied exculpatory evidence that would have enabled counsel to impeach their testimony. Claim 51 contended that death by electrocution amounts to cruel and unusual punishment in violation of the Eighth Amendment. On November 12, 1993, counsel filed a fourth amended petition raising no new actual claims, but arguing that the claims already presented in that proceeding were not barred by the waiver provisions of Tenn. Code Ann. § 40-30-112(b).

On April 24, 1994, the state trial court dismissed the petition under Tenn. Code Ann. § 40-30-112(b), holding that all grounds raised in the amended petition were barred as either previously determined or waived. Adden. 4, Doc. 1 at 230. On March 22, 1995, the Tennessee Court of Criminal Appeals affirmed. *Id.*, Doc. 5. On March 4, 1996, the Tennessee Supreme Court denied Cone's application for permission to appeal. *Id.*, Doc. 11.

Cone then filed a motion for rehearing, contending that the 1992 decision of Capital Case *Resource Center v. Woodall*, No. 01A01-9104-CH-00150, 1992 WL 12217, (Tenn. App. Jan. 29, 1992), had opened access to previously unavailable records from the prosecutor's file. *Id.*, Doc. 12. Cone argued under *Caldwell v. State*, 1996 WL 74160 (Tenn. Feb. 20, 1996), that claims only ascertainable after the *Capital Case Resource Center* holding constituted "late-arising" claims under state law. Cone argued that he should be permitted to have these claims considered on the merits. In his motion for rehearing,

Cone also argued that his claims that depended on the hiring of expert witnesses and investigative services should also not be deemed waived, because the Tennessee Supreme Court decision enunciating a procedure for obtaining such services during a post-conviction proceeding was not decided until 1995. *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). On May 6, 1996, the Tennessee Supreme Court denied the motion for rehearing. Adden. 4, Doc. 13. On October 15, 1996, the United States Supreme Court denied Cone's petition for certiorari.

E. *Federal Court Habeas Petition*

Petitioner then filed a motion in the United States District Court for the Middle District of Tennessee to stay his execution pending appointment of counsel and the filing of this federal habeas petition. The Middle District Court transferred the case to this court, which granted the stay, appointed counsel, and permitted the filing of this petition.

III. CLAIMS FILED IN THIS PETITION

This petition asserts numerous grounds for relief. This order is concerned only with the claims on which Cone seeks an evidentiary hearing. Cone's motion seeks an evidentiary hearing on claims numbered 39, 40, 41, 61, and 65 in his habeas petition. The state has opposed this motion contending both that the claims do not merit a hearing under § 2254, and that the claims are mostly barred by Cone's procedural default. Cone contends that the claims are not procedurally defaulted.

A. *Law Governing Procedural Default*

Twenty-eight U.S.C. § 2254(b) states, in pertinent part:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.[3]

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[3] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (codified, *inter alia*, at 28 U.S.C. § 2244 et seq.) ("AEDPA"), substantially revised the procedural and substantive standards

Thus, a habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. *See, e.g., Granberry v. Greer*, 481 U.S. 129 (1987); *Rose v. Lundy*, 455 U.S. 509 (1982). *See also* Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner has failed to exhaust his available state remedies if he has the opportunity to raise his claim by any available state procedure. *Preiser v. Rodriguez*, 411 U.S. 475, 477, 489-90 (1973).

To exhaust these state remedies, the applicant must have presented the very issue on which he seeks relief from the federal courts to the courts of the state that he claims is wrongfully confining him. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief." *Gray v. Netherland*, 116 S. Ct. 2074, 2081 (1996) (citing *Picard*, 404 U.S. at 271). " '[T]he substance of a federal habeas corpus claim must first be presented to the state courts.' " *Gray*, 116 S. Ct. at 2081 (quoting *Picard*, 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." *Gray*, 116 S. Ct. at 2081.

Conversely, "[i]t is not enough to make a general appeal to a constitutional guarantee as broad as due

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by which state prisoners can seek habeas relief from the federal courts. The quotation of 28 U.S.C. § 2254(b) is from the revised, post-AEDPA version of the subsection. For purposes of procedural default analysis, the changes to § 2254(b) are not significant.

process to present the 'substance' of such a claim to a state court." *Id.* When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987). He has not exhausted his state remedies if he has merely presented a particular legal theory to the courts, without presenting each factual claim. *Id.* The claims must be presented to the state courts as a matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). *Cf. Duncan v. Henry*, 115 S. Ct. 887, 888 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."). *Cf. Gray*, 116 S. Ct. at 2081.

Moreover, the state court must address the merits of those claims. *Coleman v. Thompson*, 501 U.S. 722, 734-35 (1991). If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from seeking federal habeas review, unless he can show cause and prejudice for the default. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

When a petitioner's claims have never been actually presented to the state courts, but a state procedural rule prohibits the state court from extending further consideration to them, the claims

are deemed exhausted, but procedurally barred. *Coleman*, 501 U.S. at 752-53; *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright*, 433 U.S. at 87-88; *Rust*, 17 F.3d at 160.

A petitioner confronted with either variety of procedural default must show cause and prejudice for the default in order to obtain federal court review of his claim. *Teague*, 489 U.S. at 297-99; *Wainwright*, 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman*, 501 U.S. at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." *Schlup v. Delo*, 115 S. Ct. 851, 865-66 (1995) (quoting *Murray*, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 115 S. Ct. at 867.

B. *Analysis of Petitioner's Claims*

In this case, analyzing procedural default has been made more difficult by the petitioner's confusing presentation of his claims, and the respondent's failure to articulate which specific claims are subject to which specific procedural default. Paragraphs 39, 40, 41, 61,

and 65 of Cone's petition contain a total of fifty-one claims in subparagraphs, (39(a-k) and 40(a-rr)), upon each of which petitioner claims entitlement to an evidentiary hearing.[4] Of these fifty-one claims, however, only four are both properly exhausted and not the subject of some procedural default during the state court proceedings. Cone's contention in claim 40(h), repeated at 40(qq), that his attorney provided

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[4] Cone's counsel divided the petition into paragraphs and subparagraphs, not all of which actually contain different claims. Subparagraph 39(b) and (c) simply consist of argument regarding the exculpatory effect of the eight allegedly exculpatory documents listed in subparagraph 39(a). Subparagraph 39(d) is an introduction to a *Brady v. Maryland*, 373 U.S. 83 (1963), claim based on the ten documents listed in subparagraph 39(e). Subparagraphs 39(f)-(h) actually enunciate the *Brady* claim based on those documents. Subparagraph 39(i) recites six documents which Cone's counsel assert reflect on the veracity of prosecution rebuttal-witness Ilene Blankman. Subparagraph 39(j) asserts a *Brady* claim based on evidence that money recovered from Cone's car was returned to the grocery store. Subparagraph 39(k) generally reasserts all of the previously asserted *Brady* claims. The Court construes these as four different claims:

1) a *Brady* claim that the prosecutor failed to reveal documents in the prosecutor's filed related to Cone's drug use;

2) a *Brady* claim based on the prosecution's failure to reveal documents in the FBI's possession related to Cone's drug use;

3) a *Brady* claim based on the prosecution's failure to reveal documents related to Blankman's testimony; and

4) a *Brady* claim based on the prosecution's failure to reveal that money seized from Cone's car was returned to the grocery store.

ineffective assistance when he failed to present any proof in mitigation of the death penalty was decided adversely to Cone during the first state post-conviction proceeding. Claim 40(i), that his attorney provided ineffective assistance by not making any closing argument at the penalty phase of the trial, was likewise decided against Cone on the merits during that same proceeding. Claim 39(j) duplicates claim 41. Cone contends that he was deprived of due process by the prosecutor's guilt-phase closing argument that jurors should reject Cone's drug-user defense because the amount of money found in Cone's car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery. This claim was decided on the merits adversely to petitioner during the first post-conviction proceeding, and was included in Cone's application of permission to appeal to the Supreme Court. Finally, claim 61, that electrocution is cruel and unusual, was decided adversely to Cone on his direct appeal from his conviction and sentence.

The remaining claims have never been presented on the merits to the Tennessee Supreme Court. Particular mention should be made of several claims. Cone's ineffective assistance claims 40(h), 40(j) through 40(gg), and 40(qq) are simply verbatim repetitions of claims he originally stated in the *pro se* state petition he filed on June 15, 1989, amended on June 22, 1989, and amended again on August 13, 1993. *See* Adden. 3, Doc. 1, at 28-31, 38-40; Adden. 4, Doc. 1, at 67-71.

Claim 40(g), that counsel provided ineffective assistance by failing to introduce evidence that Cone had won a Bronze Star in Vietnam, is frivolous in light

of Cone's submission, during the trial phase of the first post-conviction proceeding, of proposed findings of fact asserting that counsel did in fact obtain admission of this evidence. Adden. 2, Doc. 1 at 97. This evidence was admitted during the penalty phase of Cone's trial. Trial Trans. At 2123. Accordingly, this claim is DISMISSED.

Claim 40(r), that Cone's trial counsel had inadequate experience and expertise to handle a death penalty case is not an assertion of a Sixth Amendment violation. A Sixth Amendment claim requires a showing of deficient performance by counsel, and prejudice to the defendant from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). While counsel's experience is evidence on which a court might rely in evaluating counsel's performance, it is not in itself a basis for relief. Accordingly, this claim is DISMISSED.

Claim 40(x), that Cone's trial counsel provided inadequate advice regarding whether Cone should testify during the guilt and penalty phases of the trial, was decided adversely to Cone on the merits by the Tennessee Court of Criminal Appeals during the first post-conviction proceeding. Adden. 2, Doc. 4 at 8. Cone did not, however, present this claim to the Tennessee Supreme Court in his application for permission to appeal. Adden. 2, Doc. 5 at 2. He did later raise it as claim 15(n) in the August 1993 petition that was dismissed as procedurally barred. Adden. 3, Doc. 1 at 39.

Claims 40(a), (b), (c), (d), (e), and (f), all relating to trial counsel's alleged ineffectiveness in developing and presenting evidence regarding Cone's mental

health and drug use, have never been presented to the state courts. Claim 40(mm), that counsel failed to conduct adequate cross-examination of prosecution witnesses has never been presented to the state courts. Likewise, claim 40(oo), that counsel inadequately investigated and presented evidence regarding Cone's potential for living a worthwhile life in prison as a means of persuading the jury of the existence of a mitigating circumstances, [sic] has never been presented to the state courts.[5]

Claim 40(pp), that counsel inadequately cross-examined the state's medical experts, and that the State withheld exculpatory evidence with which to impeach them, was held waived on direct appeal of the first post-conviction petition. Adden. 2, Doc. 4 at 6. Petitioner did not include this claim in his application for permission to appeal from that ruling. He did later raise it as claim 15(af) in the August 1993 petition that was dismissed as procedurally barred. Adden. 4, Doc. 1 at 70.

Of the eleven *Brady* claims, only two, claims 39(a) and (i), were even arguably presented to the state post-conviction trial court. Claim 39(a) was raised as claim 20(d) in the June 22, 1989 *pro se* petition. Claim 39(i) was raised in claim 35 in the August 1993 petition. The state court held both claims waived and that decision was affirmed on appeal.

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[5] Cone has presented the state courts with similar claim 40(ff), that his counsel provided ineffective assistance by failing to request an instruction on this issue. *See* Adden. 4, Doc. 1 at 70. This claim was held procedurally barred under Tenn. Code Ann. § 40-30-112.

Cone now argues that his procedural defaults should be excused. This argument essentially reduces to two parts: 1) that the 1994 holding by the state post-conviction court that the ineffective assistance grounds were "previously determined" constitutes a ruling on the merits of all of his ineffective assistance claims; and 2) that the inadequacy of the state post-conviction procedures precluded him from raising the claims, especially the *Brady* claims. Neither argument has merit.

Cone argues that since he presented these ineffective assistance claims to the state court, but through no fault of his own did not receive a full and fair hearing, he is not barred from presenting them in this petition and is entitled to an evidentiary hearing. This argument misconstrues both the applicable Tennessee law and the standard governing federal habeas review of procedurally defaulted claims.

The State post-conviction trial court set forth the following analysis in its 1994 ruling:

> The Court finds, after a careful and thorough review based upon the entire record including the direct appeal and the first Petition for Post Conviction Relief and the pleadings, affidavits, and briefs of respective counsel[,] that the Second Petition for Post Conviction Relief as amended must be dismissed because the grounds stated in the Petition as amended have been either previously determined or presumptively waived as a matter of law.
>
> The petition fails to state any new

grounds that have not already been decided on direct appeal or the First Petition for Post-Conviction Relief. A distinction should be noted between a "ground" and a "factual claim" to support the ground. T.C.A. 40-30-105 states, to wit:

> "Grounds for Relief — Relief under this chapter shall be granted when the conviction is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right."

> T.C.A. 40-30-111 states, to wit: "Scope of hearings" — the scope of the hearing *shall extend to all grounds* the petitioner may have, *except those grounds which the court finds shall be excluded because they have been waived or previously determined*, as herein defined." (Emphasis added).

It is, then, clear that a "ground" is a constitutional right. "Facts" are alleged by the petitioner to support the "grounds". Facts that are merely cumulative or conclusory in nature are non-supportive and will be disregarded.

In the Second Petition sub judice the petitioner employs the word "claim" to

> describe either a ground or a fact in support of the ground. This is somewhat confusing[,] but obviously an alleged fact is not a constitutional right, and there should be a distinction made in the manner in which the petition is drawn.

Adden. 4, Doc. 1, at 232.

The order then refers to former Tenn. Code Ann. § 40-30-112, which stated:

> When ground for relief is "previously determined" or "waived."
>
> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (b)(2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112 (1990). The court then held:

> Ineffective assistance of counsel. This ground was previously denied on direct appeal and the First Petition for Post Conviction Relief.

> The claimed factual allegations herein are merely cumulative or have been presumptively waived for failure to present upon direct appeal or the First Petition For Post Conviction Relief.

Adden. 4, Doc. 11 at 233. This determination was explicitly affirmed by the Court of Criminal Appeals.

> In his first post-conviction petition, the appellant presented five factual allegations to support his constitutional claim of ineffective assistance of counsel. His second petition, on the other hand, listed thirty-five separate deficiencies in his trial counsel's performance. The trial court found that ineffective assistance of counsel is a single "ground for relief" as contemplated by the statute, *see* T.C.A. § 40-30-111, and that the issue of ineffective assistance of counsel was therefore previously determined. We agree with the trial court. A petitioner may not relitigate a previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts to revive an old issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.

Cone v. State, 927 S.W.2d 579, Adden. 4, Doc. 5, at 5.

Cone argues that this determination that the ineffective assistance ground was previously determined is not a finding of procedural default. This

argument is mistaken. From the above decisions, it is clear that when a ground for relief, such a ineffective assistance of counsel, is raised in a Tennessee post-conviction petition, subsequent consideration of factual allegations supporting that ground are barred by the prior presentation of that ground. Cone's argument to the contrary is based on his mistakenly equating the federal habeas term of art "claim" with the Tennessee phrase "ground for relief."

Under § 2254(b), exhaustion is required of every single factual aspect of a claim, not merely of generalized assertions of constitutional error. *Piflette*, 824 F.2d at 497-98. The state court refused to consider the merits of the factual allegations supporting any further Sixth Amendment ineffective assistance ground in the 1993 petition because petitioner had already had an opportunity to present his contention, (whether described as a "claim" or as a "ground for relief"), that his attorney provided ineffective assistance.

By refusing to consider the later factual allegations on the merits, the state courts erected a procedural bar in this federal habeas proceeding, not to every possible claim of ineffective assistance under the Sixth Amendment, but to the specific claims based on those particular factual allegations. That the state court does not use terms that parallel federal habeas analysis in describing the "claims" asserted in state post-conviction proceedings is irrelevant.[6]

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[6] In an analogous context, the Supreme Court, discussing the state court's obligation to state clearly when it is denying a claim on procedural grounds, noted that:

Petitioner argues that by declaring the ground of ineffective assistance "previously determined" the state courts have admitted that his Sixth Amendment claims have been decided on the merits. Petitioner reasons that since he cannot be procedurally barred from raising claims decided on the merits, the state court has decided all of his ineffective assistance *claims* on the merits for purposes of federal habeas review.

> [w]e encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim — every state appeal, every denial of state collateral review — in order that federal courts might not be bothered with reviewing state law and the record in the case.

Coleman, 501 U.S. at 739. Similarly, the Fifth Circuit has opined in upholding a procedural default defense:

> [w]e decline today to impose on the [Texas Court of Criminal Appeals] the need to pronounce some shibboleth or incant some magic words guaranteeing safe passage from a holding based on a state procedural bar to an alternative holding on the merits without infecting the opinion with "excuse" and thus dooming it to inadequacy. We likewise decline Amos' invitation to hold that a court's particular choice of words or phrases to reflect the shifting of its focus from a holding grounded on independent state law to an alternative holding based on federal law is dispositive when determining whether that state-law ground is adequate.

Amos v. Scott, 61 F.3d 333, 341 (5th Cir.), *cert. denied*, 116 S. Ct. 557 (1995).

The difficulty with petitioner's argument is that it is clear that almost all of the specific Sixth Amendment claims asserted in this petition were not addressed on the merits by the state courts. It is clear that the state courts interpreted the "previously determined" language as a type of procedural bar — a legal determination that certain claims resting on specific factual support should have been presented at the time the petitioner raised similar claims within a broad ground implicating the same constitutional right. Accordingly, for federal habeas purposes, the "previously determined" category is a type of procedural default as to those claims.

Cone may contend that the state courts should describe all such procedural defaults as a type of waiver. This argument, however, merely amounts to an assertion that the state courts have misapplied state law in creating a procedural barrier to considering the merits of those claims. A federal court cannot refuse to honor an adequate and independent state ruling because it disagrees with the state court's interpretation of state law. Moreover, this argument merely amounts to a disagreement over the terminology used by the state court. Petitioner's attempt to recast state court terminology to make his claims reviewable misconstrues both state and federal law.

Cone argues also that the Tennessee Supreme Court decision in *House v. State*, 911 S.W.2d 705, 713-14 (Tenn. 1995), issued after Judge Williams denied Cone's second amended state petition, changed the standard for waiver in Tennessee. According to Cone, prior to *House*, Tennessee courts applied a subjective standard for waiver that required a personally

knowing and voluntary decision by the prisoner to waive the claim.[7] According to Cone, *House* changed this to find waiver based merely on non-presentation of a claim. This contention misconstrues both prior Tennessee caselaw and *House*.

House simply definitively resolved the issue of whether the phrase "knowingly and understandingly" enunciated a subjective test based only on the petitioner's personal awareness, or an objective test based on what his attorney reasonably should have known. 705 S.W.2d at 713-14. According to the Tennesse [sic] Supreme Court, "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." 705 S.W.2d at 714. Moreover, it is clear from *House* that the Supreme Court's decision was shaped by the existing Tennessee caselaw, and merely clarified that body of law. Indeed, the *House* decision parallels the result in Cone's state court cases.

Furthermore, petitioner's argument that prior caselaw enunciated a subjective standard both conflicts with House's analysis of that body of law and is not supported by the single case on which he relies. *See Wooden v. State*, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994)). In 1992, Wooden, a Tennessee prisoner, filed a third post-conviction petition seeking to invalidate his 1982 rape conviction based on allegedly exculpatory evidence in police files that were unavailable to him until after the decision in *Freeman*

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[7] Memorandum in Support of Petitioner's Motion for an Evidentiary Hearing, at 9 (citing *Wooden v. State*, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994)).

v. Jeffcoat, No. 01A01-9103-CV-00086, 1991 WL 165802 (Tenn. App. Aug. 30, 1991), *perm. app. denied*, (Tenn. 1992), made the Tennessee Public Records Law applicable to certain police records. The trial court dismissed Wooden's petition as barred by the former three year statute of limitations on Tennessee post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102 (1990). The appellate court, in *dicta*, observed that "it is doubtful that the defense of waiver would apply" and then remanded the case because the state conceded that the prisoner was entitled to a hearing on whether the statute of limitations would bar claims based on allegedly exculpatory evidence released under the public records law. This case, therefore, does not stand for the proposition that Tennessee courts had adopted and uniformly applied a subjective test for waiver prior to *House*.

Moreover, *Wooden* was not even decided until after Cone filed his various state court petitions. Accordingly, his argument that his reliance on an existing body of state law in filing his petitions should excuse his waiver of his various claims is without merit. His argument that *House* is a retroactive change in Tennessee law is likewise unavailing. In essence, petitioner merely disagrees with the way in which the Tennessee courts have applied Tennessee's post-conviction procedures to bar review of the merits of the most of his claims. This does not establish that the procedural bar does not exist.

Petitioner's arguments in support of overcoming this procedural bar closely resemble his arguments against its existence. With regard to his ineffective assistance claims, petitioner had the opportunity to raise each of the claims at issue when he first filed a

post-conviction petition. Each of the asserted factual claims related to trial counsel's performance were ascertainable from the record when Cone's attorney filed his first post-conviction petition. Cone offers no real excuse for failing to raise those claims in his first post-conviction petition, apart from a rather conclusory argument that his post-conviction counsel was ineffective. It is clear that there is not right to effective assistance of counsel in a state collateral proceeding. *Coleman*, 501 U.S. at 752. Accordingly, an error committed by petitioner's post-conviction counsel is not attributable to the state so as to constitute cause for a default. Rather, according to *Coleman*, the petitioner in a state collateral proceeding "must bear the risk of attorney error that results in procedural default." 501 U.S. at 752-53. Thus, Cone's ineffective assistance claims, except for the [sic] those presented to the Tennessee Supreme Court in the application for permission to appeal the denial of his first post-conviction petition, are barred here.

As to the *Brady* claims, Cone also attempts to argue that those claims were improperly held waived by the state courts. The only claims that were presented to the state courts, however, were conclusory assertions that the state had generally withheld exculpatory documents, and had withheld documents that might have been useful to impeach prosecution rebuttal witness Ilene Blankman. *See* June 22, 1989 Petition at ¶ 20(d), Adden. 3, Doc. 1 at 43; Aug. 13, 1993 Petition at ¶ 35, Adden. 4, Doc. 1 at 81. Of the eleven instant Brady claims on which Cone asserts entitlement to an evidentiary hearing, only claim 39(i) was specifically within the scope of the post-conviction proceeding claims. The other claims,

having never been presented to the state courts, are now barred by the state post-conviction statute of limitations.[8] *See Hannah v. Conley*, 49 F.3d 1193, 1194-95 (6th Cir. 1995).

It appears that petitioner contends that he can demonstrate cause for this procedural default because he did not have access to the documents supporting the defaulted claims until he utilized federal discovery procedures in this habeas case. This contention is without merit. The petition admits that the documents

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[8] Tennessee law previously set a three-year statute of limitations for filing post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102 (1990). The period of limitations for Cone's conviction began on the statute of limitations' effective date of July 1, 1986, and expired on July 1, 1989. *State v. Masucci*, 754 S.W.2d 668 (Tenn. Crim. App. 1988) (original statute of limitations began running on effective date of act for all convictions that were final before that date).

In 1995, Tennessee repealed the previous post-conviction statute and replaced it with a completely new statute containing a one-year limitations period. Tenn. Code Ann. § 40-30-202(a) (Supp. 1995). The new statute was effective May 10, 1995. *See* 1995 Tenn. Pub. Acts Ch. 207 § 3, as amended by 1996 Tenn. Pub. Acts ch. 995 § 10 (May 13, 1996). The Tennessee Supreme Court has recently held that the amended statute does not provide a new "one-year window" from the effective date of the act in which every defendant could file a petition. Rather, if the petition would have been barred by the three-year statute provided under the previous act, it is still barred by the 1995 amendments. *See Carter v. State*, 952 S.W.2d 417, 420 (Tenn. 1997). Cone filed his second state post-conviction petition on June 16, 1989, fourteen days before the post-conviction statute of limitations expired. The statute was tolled during the time the second petition was pending, and expired, at the latest, fourteen days after the March 4, 1996 denial of Cone's petition for rehearing in the Tennessee Supreme Court.

from claims 39(a), 39(i), and 39(j) were all made available to Cone during the second post-conviction proceeding. *See* Adden. 4, Doc. 1 at 104 (State's response to request for discovery during post-conviction proceedings, stating "The original file has already been made available to counsel for petitioner."). Moreover, the petitioner admits that these documents were available during the second proceeding. *See* Petition at 13, n.7 (noting 1992 change to Tennessee public records law making records available).

The argument that the state's post-conviction procedures were inadequate to provide Cone with the opportunity to present those claims also ignores Cone's own admission in his motion for rehearing before the Tennessee Supreme Court in his second post-conviction proceeding that the *Brady* evidence has been available to him since 1992. *See* Adden. 4, Doc. 12 at 1-2. His amended post-conviction petitions were not filed until August of 1993. Adden 4, Doc. 1 at 64. Yet, of the specific *Brady* claims raised in this case, only one was ever even arguably raised before the state courts. Cone's state post-conviction counsel apparently never utilized the Tennessee Public Records Act procedures to obtain the information, or did not consider the evidence to be of value if they did, in fact, obtain it. As discussed above, my mistakes made by Cone's state post-conviction counsel in handling that state petition cannot constitute cause under Coleman. By failing to present claims 39(a) and 39(j) to the state court, Cone procedurally defaulted those claims. He cannot demonstrate cause for this default.

Claim 35 in Cone's amended second post-conviction petition was held waived by the state court.

This claim arguably parallels claim 39(i) in this petition. Cone asks this court to declare that the claim was not actually waived because he had no opportunity to uncover the facts supporting the claim during the first post-conviction petition. This contention is without merit, however, because of the conclusory manner in which Cone asserted the claim during the second post-conviction petition. Despite the admitted availability of the materials from the prosecutor's file, Cone never relied on any specific document, and never made any specific *Brady* claim before the state court. He therefore failed to establish any basis for rebutting the statutory presumption of waiver of this claim. Accordingly, this claim is also procedurally defaulted, and Cone has failed to establish cause for this default.

Moreover, even if Cone's argument amounted to cause for this default, he cannot establish any prejudice based on the withholding of the information related to Blankman's testimony. These six items of information were:

1) A letter from the prosecutor to Blankman confirming their earlier conversation and providing her statement;

2) A letter from the prosecutor to Blankman confirming her court appearance and again providing the statement;

3) An F.B.I. report describing an event *after* the trial in which Blankman, while eating at a public restaurant, did not respond when someone accused her of lying;

4) The presence in the F.B.I. file of a copy of

a report by Dr. Jonathan Lipman;

5) The prosecutor's notes of a pre-trial interview with Blankman. These notes allegedly do not contain any reference to the statements Blankman afterwards made during her rebuttal testimony about her observations of Cone;

6) A letter from the prosecutors thanking Blankman for her testimony.

Petition at 16-17. None of these items fall within *Brady*, which requires the government to disclose to a criminal defendant evidence that is both favorable and material to guilt or punishment. *See United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)). *See also United States v. Bagley*, 473 U.S. 667, 682 (1985); *United States v. Agurs*, 427 U.S. 97, (1976).

Items 3 and 6 concern post-trial events, and do not tend to prove any fact that would establish Cone's innocence. Items 1 and 2 also do not tend to prove any fact that is both favorable to Cone and material to his guilt or punishment. Item 5 consists not of information, but an absence of information. Cone attempts to turn this void into positive exculpatory evidence. This contention is frivolous. Information is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. The question is not whether the defendant would more likely than not have received a different

verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Id.* at 678. That Blankman's in-court testimony is absent from the prosecutor's pre-trial notes does not undermine confidence in the outcome of petitioner's trial, thus those notes are not material.

Moreover, to the extent that this document would have been useful to establish that Blankman had not previously told anyone the facts to which she testified at trial, this evidence was admitted at trial through the cross-examination of Blankman and through the cross-examination of officer Roby. *See* Trial Transcript at 1896-1905, 1943-45. This document would not have resulted in any appreciable further impeachment of Blankman's testimony and was, therefore, not material to Cone's guilt or punishment under *Bagley* and *Brady*. As this document was not material, Cone cannot demonstrate the prejudice necessary to overcome a procedural default of this claim. Alternatively, under § 2254(b)(2), this claim is completely devoid of merit, regardless of issues of exhaustion or procedural default.

As to the fourth item, the presence in the F.B.I. file of Dr. Lipman's report is not only not exculpatory, but is not even probative of anything. Cone argues that the presence of Lipman's report:

> demonstrat[es] that both Ilene Blankman as well as F.B.I. agent Flynn, both of whom testified against Mr. Cone, had been

> informed about the evidence presented by the defense at trial and what they were specifically being called to rebut, thus demonstrating that such witnesses were not disinterested, truthful. witnesses, but specifically collaborating with the prosecution to present facts against Mr. Cone.

Petition, ¶ 39(I)(iv) at 17. This claim is entirely speculative and does not establish that the prosecutors withheld exculpatory information from the defense. Dr. Lipman was one of the experts who testified for the defense. His report on Cone's condition would naturally appear in the F.B.I.'s file. Its presence does not tend to make it more likely that the prosecution engaged in misconduct with regard to Blankman's testimony. As noted, Cone's trial counsel subjected Blankman to searching cross-examination in an attempt to demonstrate that her rebuttal testimony was a last-minute fabrication. This claim is simply an attempt to create a claim where none exists.

The evidence of Cone's guilt was overwhelming, and the material evidence that he was acting under the influence of amphetamine psychosis was, and continues to be, virtually nonexistent.[9] The allegedly

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[9] In this regard, the court should mention briefly that the eight items of supposed *Brady* material on which Cone relies in ¶ 39(a) are not exculpatory either. These items consist primarily of copies of fugitive alerts provided to various law enforcement agencies throughout the country during the hunt for Cone. They mention that Cone was a "hearvy drug user". Cone argues that this contradicted prosecution witnesses who testified that they did not observe Cone use drugs, did not observe any needle tracks on his body, and observed that his behavior was inconsistent with

exculpatory information on which he relies would not have cast any doubt on the testimony of Blankman. As to this claim also, Cone cannot establish cause for his procedural default and cannot establish a constitutional violation, even apart from that default.

Claim 65 in Cone's habeas petition, regarding his presence at counsel table, is also defaulted. Cone does not offer a reason for his failure to raise this claim in his first *post-conviction* petition, nor any basis for avoiding a procedural default. Finally, with regard to all of the procedurally defaulted claims, Cone has not demonstrated that he is actually innocent, either of the original crimes of murder, or of the death penalty.

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a person under the influence of any drugs. Agent Flynn testified that Cone admitted to using cocaine, Dilaudid, and Demerol. Flynn did not testify that Cone said anything about amphetamine abuse. Given that the issue at trial was not whether Cone had ever abused any drugs (he clearly had), but whether he was out of his mind on amphetamines at the time of the murders, this evidence does not devastate the state's case or even credibly impeach the state's witnesses. Cone's claims in this regard are exaggerated and devoid of merit. To the extent that the alerts were remotely relevant, they might have tended to prove that the police were initially cautious regarding the characteristics of a person who had committed several heinous crimes. Apparently, Cone's father made mention to a police officer during the initial investigation of Cone's *prior* drug use. Seemingly out of an abundance of caution, the police included this possible characteristic in their alert. Clearly, the evidence as subsequently developed during the investigation established that Cone's drug use was irrelevant to his commission of these offenses. Furthermore, Cone's reliance on the number of such alerts is misplaced. The probative value of each of these irrelevant items is not increased by their accumulation. Finally, Cone cannot establish that these items are actually not provided to him during the original criminal proceedings because his trial counsel is deceased and his file is not available.

He thus cannot obtain review of those defaulted claims.

The remaining claims are not procedurally defaulted, and were decided on the merits by the state courts. These claims bear repetition here:

1) 40(h) (also (qq))1 — Cone's trial counsel provided ineffective assistance when he failed to present any proof in mitigation of the death penalty.

2) Claim 40(i) — Cone's trial counsel provided ineffective assistance by not making any closing argument at the penalty phase of the trial.

3) Claim 39(j) (also 41) — Cone was deprived of due process by the prosecutor's guilt-phase closing argument that jurors should reject his drug-user defense because the amount of money in the car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery.

4) Claim 61 — electrocution is cruel and unusual punishment.

Dealing with the last claim first, this claim is without merit and does not require an evidentiary hearing.

> Electrocution has never been found to be cruel and unusual punishment by any American court. *See, e.g., In re Kemmler*, 136 U.S. [436,] 443-44 [1890]; *Ingram v. Ault*, 50

> F.3d 898 (11th Cir. 1995); *Felker v. Turpin*, 101 F.3d [95,] 97 [(11th Cir.), *cert. denied* 117 S. Ct. 450 (1996)]; *Porter [v. Wainwright]*, 805 F.2d [930,] 943 n. 15 [(11th Cir. 1986), cert. denied, 482 U.S. 918, 107 S. Ct. 3195, 96 L.Ed.2d 682 (1987)]; *Glass v. Louisiana*, 471 U.S. 1080, 105 S. Ct. 2159, 85 L.Ed.2d 514 (1985) (Brennan, J., dissenting from denial of certiorari) ("such claims have uniformly and summarily been rejected"). No legislatively authorized method of execution in the United States is outlawed in any jurisdiction by any currently-effective court decision. *[Gomez v.] Fierro*, 117 S. Ct. [285,] 285 [(1986)]; *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994), *vacated as moot*, 93 F.3d 1434 (9th Cir. 1996).
>
> The very practice of electrocution has been upheld by other courts within the past year, and there is no argument even plausible that there are differences in the level of "evolving decency" among the different circuits or states of the union, or over the last very few years.

In re Sapp, 118 F.3d 460, 464 (6th Cir.), *cert. denied* 117 S.Ct. 2536 (1997). *Accord, Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding that subjecting a convict to electrocution a second time after a first attempt at execution failed was not cruel and unusual punishment), *Williams v. Hopkins*, 130 F.3d 333, 337 (8th Cir. 1997) (following *Sapp* and rejecting § 1983 claim that electrocution is cruel and unusual punishment); *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995); *Johnson v. Kemp*, 759 F.2d 1503,

1510 (11th Cir. 1985) ("The contention that death by electrocution violates the Eighth Amendment is frivolous."); *Sullivan v. Dugger*, 721 F.2d 719, 720 (11th Cir. 1983) (denying motion for a TRO alleging that "the carrying out of appellant's death sentence by means of electrocution is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"); *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (5th Cir. 1978) (following *Klemmer* and finding cruel and unusual punishment argument without merit).

In deciding whether a particular form of capital punishment is unconstitutionally cruel and unusual, the federal courts "look to objective factors to the maximum extent possible. Among these factors are statutes passed by society's elected representatives. We presume that a punishment selected by a democratically elected legislature is constitutionally valid." *Campbell v. Todd*, 18 F.3d 662, 682 (9th Cir.) (holding hanging not cruel and unusual), *rehearing en banc denied*, 20 F.3d 1050 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994). Given that the Tennessee legislature has declared electrocution to be the form of capital punishment in this state, that capital punishment is not, in and of itself, cruel and unusual, *Gregg v. Georgia*, 428 U.S. 153 (1976), that many other states also impose death by electrocution, and that no court has ever held electrocution inherently cruel and unusual, this claim is legally without merit.

Furthermore, the court has reviewed the scientific paper on which Cone relies, Exh. C to Memorandum in support of Petitioner's Motion for Evidentiary Hearing. This paper establishes that electrocution is painful. What the paper fails to

mention, however, is any estimate of how long a person remains conscious and could actually experience pain while being executed in an electric chair. The paper disputes, *Id.* at 30, the contention by the chair's manufacturer that unconsciousness generally occurs in 1/240th of a second, but does not attempt to provide a correct figure. Regardless of the intensity of the pain inflicted by electrocution, a duration of 1/240th of a second cannot be said to be cruel and unusual, and petitioner has not carried his burden to demonstrate that he will survive for any longer period of time.

Most importantly, § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Given the state of the law as discussed above, it cannot

be said that the Tennessee Supreme Court's rejection of this claim on direct appellate review "involved an unreasonable application of clearly established Federal law." Accordingly, this claim is without merit. Petitioner's third claim is also without merit. Cone contends that he was deprived of due process at the guilt phase by the prosecutor's argument that the jury should conclude that Cone was a drug seller instead of a user based on the money found in his vehicle, even though the prosecutor knew the money originated from Cone's robbery of a grocery store. This claim exaggerates the importance of the prosecutor's statement and ignores the other evidence that Cone was indeed involved in selling drugs. This claim was raised and fully addressed during Cone's first post-conviction proceeding. At trial, the prosecution established that Cone's car was found to contain thee hundred thirty-nine dollars in cash in his wallet, Tr. at 1500, a huge quantity of drugs, so far beyond what could arguably be for one person's use that it required four pages of the trial transcript to list, Tr. at 1506-10, one thousand nine hundred thirty-two dollars in cash removed from the same suit bag containing the drugs, Tr. at 1512, a list of drugs, Tr. at 1513, and additional loose change, Tr. at 1513. The prosecutor argued at the closing of the guilt phase that the nineteen hundred dollars was evidence that Cone had been selling drugs rather than using them. The state court on post-conviction review held this remark to be improper but harmless. In particular, the state court noted that the primary evidence that Cone was engaged in selling drugs was the large quantity of drugs in the vehicle. Adden. 2, Doc. 4 at 4.

Under § 2254(d), Cone cannot establish that this

decision involved an "unreasonable application of clearly established Federal law as determined, by the Supreme Court of the United States." A review of the evidence in the record supports that Cone's out-of-his-mind-on-amphetamines defense was not rejected by the jury because the prosecutor accused him of being a drug seller, but because he lacked credible evidence that he had in fact abused amphetamines during any period close to the murders. The prosecution's arguments regarding these funds were simply too remote from the real issues in this case to have affected the jury's deliberations. As this claim is without merit, there is no need for an evidentiary hearing to consider additional evidence. Accordingly, this claim is DISMISSED.

Cone's Sixth Amendment argument based on his attorney's failure to offer proof of mitigation also does not require a hearing. As Cone has procedurally defaulted his claims based on counsel's alleged failure to investigate and develop proof of mitigation, this claim must be evaluated based on the mitigating evidence available to counsel at the time he made the decision. The Court of Criminal Appeals, on review of the first post-conviction petition, explained that counsel made a series of reasoned tactical and strategic decisions regarding the proof of mitigation available to him. Of that proof, the two expert witnesses had already testified, and counsel determined there was no point to presenting cumulative testimony.

Counsel determined that Cone's mother was an ineffective witness whose exposure to further cross-examination would harm her son's case more than it would help. Counsel further determined that

testimony by other potential witnesses about Cone's past would merely have revealed further criminal activity of which the jury was unaware. As the state court found, "[t]here is nothing in the record to show that the testimony of these witnesses would have benefited the defense." Adden. 1, Doc. 4 at 8. Cone does not present any facts in this petition to refute this conclusion. Moreover, it is clear that all of the legitimate mitigating proof available to Cone was introduced during the actual trial. Cone's attack on this proposition is again based on procedurally defaulted claims and allegations.

Strickland v. Washington, 466 U.S. at 687, establishes the standard for an ineffective assistance claim. A petitioner must show:

1. deficient performance by counsel; and

2. prejudice to the defendant from the deficient performance.

See id. at 687.

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. *Lewis v. Alexander*, 11 F.3d 1349, 1352 (6th Cir. 1993); *Isabel v. United States*, 980 F.2d 60, 64 (1st Cir. 1992). "[Al court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Id.* at 697.

To demonstrate prejudice, a movant under § 2255

must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Additionally, however, in analyzing prejudice,:

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair. trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)). "Thus an analysis focusing solely on mere outcome. determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Fretwell*, 506 U.S. at 369.

In this case, Cone has failed to demonstrate any prejudice from the failure of his trial counsel to introduce any then-available evidence at his sentencing hearing. Cone's argument that counsel's decision harmed him is based largely on speculative assertions about the effect of further evidence on the jury's deliberations, and on even more speculative assertions about what might have happened if counsel had investigated other evidence of mitigation. The latter category of claims is procedurally barred, however, and Cone's belated attempts in this court to produce mitigating evidence is of no avail.

The state appellate court, in ruling on the merits of this claim, found that the supposed mitigating evidence counsel did not introduce would have had no affect on the jury's verdict. Cone has failed to allege any facts or arguments that would undermine confidence in the reliability of the jury's verdict, and has thus failed to demonstrate a reasonable probability that the proffer of the withheld testimony would actually have affected the jury's decision. Moreover, he has failed to carry his burden to demonstrate that the verdict was fundamentally unfair or unreliable. Nor has he demonstrated that the state court's decision did not comply with the requirements of § 2254(d)(1).

This case does not involve the type of total abdication of representation condemned in *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997). Here, unlike *Austin*, counsel had already introduced some mitigating evidence, and his rejection of other evidence was based on specific analysis of the tactical effect of that evidence. This is unlike the situation in *Austin*, in which counsel simply decided that any efforts would be useless. That counsel miscalculated the jury's ultimate verdict does not turn otherwise unreviewable strategic decision-making into deficient performance. In evaluating an ineffective assistance claim, the court should not second-guess counsel's tactical decisions. *Adams v. Jago*, 703 F.2d 978, 981 (6th Cir. 1983).

Accordingly, Cone has failed to demonstrate that the state court's rejection of this Sixth Amendment claim "involved any unreasonable application of clearly established Federal law." This claim is, therefore, without merit. As Cone cannot surpass the threshold requirement of § 2254(d), he is not entitled to an

evidentiary hearing under § 2254(e). This claim as to counsel's failure to introduce mitigating evidence is DISMISSED.

Similarly, Cone has failed to demonstrate any Sixth Amendment claim based on his counsel's decision to forego a closing statement during the sentencing phase. The state court found that counsel considered that the closing argument made by one of the state court prosecutors was not so damaging as to require a response. Defense counsel considered the risk of a persuasive final response from the other more experienced state prosecutor to be so great that the defense would be better off relying on the opening statement counsel gave at the beginning of the sentencing phase. Cone fails to offer any basis for disputing the state court's determination that this decision was a tactical choice to foreclose rebuttal argument by the prosecution.

A review of the closing remarks by the first prosecutor confirm that they were relatively straightforward — simply a recitation of the existence of four aggravating circumstances. Trial Trans. at 2144-47. There was no dispute that three of these circumstances definitely existed,[10] and Cone presents no argument that any statement counsel might have made would have persuaded the jury to give greater consideration to the evidence of mitigation introduced

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[10] On direct review the Supreme Court held the fourth factor, knowingly creating a great risk of death to two or more people other than the murder victims, was not supported by the evidence because the robbery and assaults with intent to murder were not committed during the murders of the Todds. The court nevertheless held this error to be harmless beyond a reasonable doubt.

during the guilt phase. The state court's decision was a reasonable application of Sixth Amendment standards to the facts presented in the state court post-conviction proceeding.

Cone now contends that he should be given a hearing on the ineffective assistance claims because, after the first post-conviction proceeding, his original trial counsel suffered from a mental disorder that apparently culminated in his committing suicide. He offers no evidence beyond speculation, however, that this condition affected either counsel's original trial performance or the testimony he offered during the post-conviction proceeding. He has not. offered any actual evidence of either deficient performance or prejudice affecting the fairness and reliability of Cone's trial or death sentence. Cone has not offered any evidence to support the conclusory allegation that counsel was incapable, during the first state court post-conviction proceeding, of remembering the basis for his trial decisions. Cone fails to point to any part of the trial record that contradicts counsel's post-conviction hearing testimony or any part of the record that is inconsistent with that testimony. Cone does not point to any portion of the post-conviction hearing transcript that shows that counsel acted or spoke as if he was incompetent, or to any references that would support an argument that counsel was simply fabricating his testimony.

Finally, these contentions are, an attempt to resurrect the procedurally defaulted claims of inadequate investigation and preparation. The argument that counsel's tactical decisions regarding the penalty phase of the trial were deficient and prejudicial to Cone are based on retrospective research

and speculation about the effect further evidence might have had on the jury. Additionally, most of these contentions are rooted in claims that were not presented during the first post-conviction proceeding. In effect, Cone is complaining, again, about the quality of his representation during that proceeding. As discussed above, Coleman forecloses such claims, however disguised. The claims are without merit, and are dismissed.

Accordingly, as the above claims are all either procedurally barred or correct under § 2254(d)(1), disposition of those claims without an evidentiary hearing is proper. Rule 8(a), Rules Governing Section 2254 Cases in the United States District Courts. Petitioner's motion is, therefore, DENIED, and those claims are hereby DISMISSED.

Cone devoted considerable argument to his contention that he is entitled to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963), and *Keeney v. Tamyo-Reyes*, 504 U.S. 1 (1992). As the Court has determined that the claims are without merit, and as Cone has not established that any decisions involved an unreasonable application of clearly established federal law, he is not entitled to an evidentiary hearing in any event. The Court, therefore, need not address the issue of whether or how the standards enunciated in *Townsend* and *Keeney* apply after the enactment of new 28 U.S.C. § 2254(e).

IV. CONCLUSION

For the reasons set forth above, petitioner's motion for an evidentiary hearing is DENIED, and the claims addressed in his motion are hereby

DISMISSED.

IT IS SO ORDERED this 15 day of May, 1998.

/s/ Jon Phipps McCalla
JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

[Table Omitted In Printing]

OPPOSITION BRIEF

(13)

(4)

No. 07-1114

FILED
MAY 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CAPITAL CASE
QUESTIONS PRESENTED

1. Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts?

2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

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OPINION BELOW

The opinion of the court of appeals that is the subject of this petition is published at 492 F.3d 743. (App. 6a) The memorandum opinion of the district court relevant to Cone's *Brady* claim (App. 86a) is unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on June 19, 2007. (Pet. App. 1) The court denied rehearing on September 26, 2007. By order entered December 11, 2007, Justice Stevens extended the time for filing a petition for writ of certiorari from December 25, 2007, until February 23, 2008. (07A486) Petitioner filed a certiorari petition on February 25, 2008. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, which governs federal habeas corpus remedies for applicants in State custody, provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State. . . .

STATEMENT OF THE CASE

I. Procedural History

In 1982, a Tennessee jury convicted petitioner, Gary Bradford Cone, of two counts of first-degree murder for the murders of Shipley O. Todd and his wife, Cleopatra Todd, on August 10, 1980, in their home in Memphis, Tennessee. The jury sentenced Cone to death for each of the murders. The Tennessee Supreme Court affirmed the judgment, and this Court denied certiorari. *State v. Cone*, 665 S.W.2d 87 (Tenn.), *cert. denied*, 467 U.S. 1210 (1984).

Cone subsequently filed a petition for post-conviction relief in the Shelby County Criminal Court. The court denied relief following an evidentiary hearing, and the judgment was affirmed by the Tennessee Court of Criminal Appeals on November 4, 1987. The Tennessee Supreme Court denied Cone's application for permission to appeal, and this Court denied certiorari. *Cone v. State*, 747 S.W.2d 353 (Tenn. Crim. App. 1987), *cert. denied*, 488 U.S. 871 (1988). Cone then filed a second post-conviction petition. The Tennessee Court of Criminal Appeals declined to address the merits of any of Cone's claims, affirming the trial court's determination that "all of the issues raised by the appellant's amended second petition were either previously determined or

waived." *Cone v. State*, 927 S.W.2d 579, 580 (Tenn. Crim. App.), *cert. denied*, 519 U.S. 934 (1996). The state court concluded that Cone "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." *Cone*, 927 S.W.2d at 582.

On July 1, 1997, Cone filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. On May 15, 1998, the district court entered an order of partial dismissal of Cone's claims and later dismissed the remainder of his claims on January 29, 1999. In its 1998 order, the district court found, *inter alia*, that numerous claims in the petition, including Cone's claim of prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), were barred from consideration due to procedural default. (App. 86a) The court further found that the specific items cited in support of petitioner's *Brady* claim were, in any event, not exculpatory. (App. 118a-119a)

On March 22, 2001, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences due to ineffective assistance of counsel at sentencing. *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). This Court granted Warden Bell's petition for writ of certiorari and, on May 28, 2002, reversed the decision of the Sixth Circuit and remanded for further

proceedings consistent with its opinion. *Bell v. Cone*, 535 U.S. 685 (2002) (*Cone I*).

On remand, the Sixth Circuit again reversed the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences, this time finding that the trial court's instructions to Cone's jury on the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague. *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004). Again, this Court reversed and remanded with instructions for "further proceedings consistent with this opinion." *Bell v. Cone,* 543 U.S. 447, 460 (2005) (per curiam) (*Cone II*).

II. Facts Relevant to the Petition

1. The proof at Cone's criminal trial and sentencing is accurately summarized in the Tennessee Supreme Court's decision on direct appeal. *Cone*, 665 S.W.2d at 90-92. The murders of Shipley and Cleopatra Todd were the climax of a series of criminal episodes that began on August 9, 1980, when Cone robbed a jewelry store at gunpoint in Memphis, Tennessee. The jewelry store manager gave a description of the suspect to the police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery. Cone apparently became alarmed and accelerated in an attempt to escape. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on

foot. As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, and pulled a gun on a third person and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone snapped his pistol several times, but the ammunition in the weapon had been exhausted.

Cone managed to elude police on August 9, but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol on her. Later that same afternoon, Cone broke into the home of Shipley and Cleopatra Todd, who lived a short distance from Ms. Tuech. Mr. Todd was 93 years of age; his wife was 79. The bodies of both victims were found mutilated and cruelly beaten three days later after authorities were alerted by anxious relatives. Both of the victims had been beaten repeatedly about the head until they died. Cone's fingerprints and hair samples were found in the Todds' home, which had been ransacked, and he was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Although he admitted killing the Todds and committing the other crimes charged, Cone claimed that he was insane, or lacked the requisite mental capacity to commit the offenses, due to drug abuse and stress arising out of his previous military service in Vietnam. On direct appeal, the Tennessee Supreme

Court found that the evidence "was overwhelmingly sufficient to sustain [Cone's] conviction on all charges." *Cone*, 665 S.W.2d 87 (Tenn. 1984).

Likewise, this Court noted that the State presented "near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings" of two elderly persons in their home. *Bell v. Cone*, 535 U.S. 685, 699 (2002).

III. The Opinions Below

The district court denied Cone's petition for writ of habeas corpus, finding in pertinent part that Cone had procedurally defaulted those claims raised for the first time in his second petition for post-conviction relief. As to the *Brady* claim, the district court specifically addressed each item cited by Cone and concluded, alternatively, that they were either procedurally defaulted or meritless. (App. 112a-119a) The Sixth Circuit unanimously agreed, affirming the district court's denial of habeas corpus relief with respect to Cone's conviction.

> Although it is a close question, we believe that Cone's claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. And even if that were not so, we are satisfied that the documents Cone complains were withheld are not *Brady* material.

(App. 56a-57a) Cone did not seek rehearing of the 2001 decision or certiorari review by this Court either as to the default or merits determination.

In 2005, following a second remand by this Court, Cone sought to revive his original *Brady* claim, arguing that *Banks v. Dretke*, 540 U.S. 668 (2004), established the "exceptional circumstances" necessary to avoid application of the law-of-the-case doctrine to preclude reconsideration of the 2001 determination. The Sixth Circuit declined to reconsider, reiterating its earlier determination rejecting Cone's claims on the merits.

> We said this before in *Cone*, 243 F.3d at 968-70, and we now say it again. A review of the allegedly withheld documents shows that this evidence would not have overcome the overwhelming evidence of Cone's guilt in committing a brutal double murder and the persuasive testimony that Cone was not under the influence of drugs. . . . It would not have been news to the jurors that Cone was a "drug user." They had already heard substantial direct evidence that he was a drug user, including the opinion of two expert witnesses, the testimony of Cone's mother, drugs found in Cone's car, and photographic evidence. Despite this evidence, the jurors concluded that Cone's prior drug use did not vitiate his specific intent to murder his victims and did not mitigate his culpability sufficient to avoid the death sentence. In short, the allegedly withheld evidence catalogued

> by the dissent does not "undermine confidence in the verdict because there is [not] a reasonable probability that there would have been a different result had the evidence been disclosed," . . . and so we reject Cone's *Brady* claims.

(App. 25a-26a)

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE SIXTH CIRCUIT'S PROCEDURAL DEFAULT ANALYSIS, ON WHICH PETITIONER'S ARGUMENT RESTS, IS NOT DISPOSITIVE OF PETITIONER'S APPEAL.

Petitioner seeks a writ of certiorari from the 2007 decision of the Sixth Circuit declining to revisit its March 2001 determination denying federal habeas corpus relief on his claim that the prosecution withheld exculpatory evidence at his capital murder trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner presents two distinct issues related to the question of procedural default and further contends that the Sixth Circuit "refused to consider" his *Brady* claim on procedural grounds. (Petition, p. 2) However, the 2001 and 2007 opinions of the Sixth Circuit demonstrate that the court of appeals' decision did not rest solely on procedural grounds. Rather, in *both* instances, the court pointedly rejected Cone's claim on the merits, concluding that the materials in question were not material for *Brady* purposes and thus

provided no basis for relief regardless of whether Cone had fairly presented the claim during his state post-conviction proceeding. (App. 17a-26a, 56a-64a) The district court likewise addressed each of the allegedly withheld items and found that, in light of the overwhelming evidence of Cone's guilt, the items were not exculpatory. (App. 118a-199a)

On appeal in 2001, the Sixth Circuit affirmed, concluding, "[W]e believe that Cone's [*Brady*] claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. *And even if that were not so, we are satisfied that the documents Cone complains were withheld were not* Brady *material.*" *Cone v. Bell*, 243 F.3d 961, 968 (6th Cir. 2001) (emphasis added). (App. 57a) In its 2007 decision, the Sixth Circuit rejected Cone's contention that this Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004), established the "exceptional circumstances" necessary to avoid application of the law-of-the-case doctrine to preclude reconsideration of the 2001 determination. The court observed that, contrary to Cone's contention, *Banks* did not find cause and prejudice for the petitioner's state-court default on his *Brady* claim "*solely* because the prosecution withheld evidence." (App. 20a) Rather, the determinative factor in *Banks* was continued "prosecutorial concealment and misrepresentation." Here, however, Cone cannot show the prosecutorial concealment or misrepresentation contemplated in *Banks*. To the contrary, Cone concedes that he had access to the District Attorney files in question at least as early as 1993 while his

second state post-conviction proceeding was pending. Moreover, the court reiterated that the claims lacked merit notwithstanding any questions concerning the default issue. (App. 24a-26a)

The Sixth Circuit has firmly established that the law-of-the-case doctrine precludes a court from reconsideration of issues "decided at an early stage of the litigation" unless there exists one of three "exceptional circumstances," including a subsequent contrary view of the law as decided by a controlling authority. *Westside Mothers v. Olszewski*, 454 F.3d 532, 537 (6th Cir. 2006) (quoting *Hanover Ins. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997)). *Banks* worked no change in the law regarding "cause" for procedural default. To the contrary, this Court specifically identified *Strickler v. Greene*, 527 U.S. 263 (1999), as controlling precedent on that question and observed that *Banks* was "congruent with *Strickler*" in all material respects.[1] *Banks*, 540 U.S. at 693. The Sixth Circuit's application of the law-of-the-case doctrine was appropriate under the circumstances of this case.

Given the Sixth Circuit's consistent rulings on the merits of Cone's *Brady* claim, his state-court default, in the final analysis, is beside the point.

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[1] The Court further made clear that its decision in *Banks* did not alter the standard of materiality for *Brady* claims, stating that "[o]ur touchstone for materiality is *Kyles v. Whitley* . . . " *Banks*, 540 U.S. at 698 (citation omitted).

Indeed, petitioner does not challenge the Sixth Circuit's merits determination in either of the questions presented. Instead, he contends that the Sixth Circuit merely "opined in passing" that the suppressed evidence would not have been material and that the court's "passing and unexamined observations . . . do not diminish the imperative" of reviewing the default determination. (Petition, 26) However, that contention is belied by the Sixth Circuit's 2007 opinion, which specifically refers to the 2001 merits determination as an alternative holding of the court – "*In the alternative, we held* . . . 'the documents Cone complains were withheld are not *Brady* material.'" (App. 19a) (emphasis added) Contrary to Cone's assertion, the federal courts have not "refused to consider" his *Brady* claims; they have repeatedly found them meritless. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). Because the Sixth Circuit has already rejected Cone's *Brady* claim on the merits in both its 2001 and 2007 opinions, further reconsideration of the procedural default issue would have no impact on the ultimate disposition of the case. Therefore, this case does not present an appropriate vehicle for resolution of the questions petitioner has presented for review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

03

Supreme Court, U.S.
FILED
MAY 2 2 2008
OFFICE OF THE CLERK

No. 07-1114

In The
Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,

v.

RICKY BELL, WARDEN
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent proposes to send petitioner to his death based on legal rulings that are so seriously flawed that the State itself has steadfastly declined to defend them both here and in the lower courts. Those undefended legal rulings, moreover, bear directly on the reliability of petitioner's conviction and death sentence, because the Sixth Circuit has closed the courthouse doors to petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution suppressed an array of exculpatory evidence that is directly relevant and material to petitioner's only defense at trial and his only argument in mitigation of the death penalty. The Sixth Circuit's holding that the claim was procedurally defaulted did not (as one might expect) rest on any failure by petitioner to present his *Brady* claim in state court. Quite the opposite and quite incorrectly, the court of appeals instead held that the claim was defaulted precisely *because petitioner had presented the claim twice* to the Tennessee courts. Unsurprisingly, the State makes no effort to defend that ruling, because there is plainly nothing to be said in its defense. It is in the teeth of *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991), and the decisions of five circuits that have faithfully adhered to *Ylst*. See Pet. 13-17.

The State instead urges this Court to leave the gravely flawed and undefended controlling precedent of the Sixth Circuit undisturbed, where it will continue to trap habeas petitioners throughout that circuit with the rule that they are, quite literally, defaulted if they do and defaulted if they don't present their claims in state court. The sole justification of-

fered by the State in this Court – at least the third different reason proffered by the State for depriving petitioner of the single federal court adjudication of his claim to which he is entitled (see, *e.g.*, Pet. 8, 12) – is the court of appeals' dicta suggesting that the *Brady* claim would fail on the merits. BIO 8-11. But that argument is more telling for what it does not say. While hinging its entire argument against certiorari on the court of appeals' passing comments, the State tellingly makes no effort to defend the legal or factual correctness of *even that dictum*.

The State thus asks this Court to make its certiorari decision with blinders on, ignoring rulings that directly defy controlling precedent from this Court and the holdings of five other circuits simply because the court of appeals uttered dicta about the possible merits of a claim – dicta that itself is indefensible both legally and factually, as the petition and both *amicus* briefs explained. But the integrity of this Court's decisions and public confidence in the death penalty are at stake when a State seeks to proceed with the denial of habeas relief and resulting execution that it steadfastly refuses to defend as lawful. In these circumstances, this Court's review is warranted, and certiorari should be granted and the case set for plenary review. In the alternative, the judgment should be summarily reversed as in irreconcilable conflict with this Court's decision in *Ylst*, *supra*, and the case remanded to the district court for consideration of the merits of petitioner's *Brady* claim in the first instance after the development of an appropriate record.

1. a. The State's sole argument against certiorari is that, after adopting its two incorrect and indefensible rules of procedural default and holding that it could not entertain petitioner's *Brady* claim, the Sixth Circuit went on to (in the State's words) "pointedly reject[] Cone's claim on the merits." BIO 8. But the court of appeals "pointedly" did precisely the opposite.

In its 2001 opinion, the Sixth Circuit examined each piece of *Brady* material individually and held that petitioner had "procedurally defaulted all four of his *Brady* claims." Pet. App. 62a. The court stressed that, because the default was not excused by cause and prejudice, it had "*no authority* to consider the claims on the merits." *Id.* 64a (emphasis added). The court reiterated "[i]n conclusion" that petitioner's alleged procedural default "foreclose[d] [it] from reaching the merits of those [*Brady*] claims." *Id.*

As the Sixth Circuit subsequently reiterated, its initial opinion "found that each [*Brady* claim] had been procedurally defaulted," Pet. App. 18a, and on that basis "held that Cone's *Brady* claims were not properly before us," *id.* 19a. When petitioner in 2007 asked the court to depart from the law of the case doctrine to reconsider the issue, the Sixth Circuit refused, explaining that "[w]e . . . will not disturb our decision that Cone's *Brady* claims are procedurally defaulted and not before this court." *Id.* 22a. Indeed, the court reaffirmed its prior holding, concluding that "[w]e *again* find that Cone's claims are procedurally defaulted and we *reject* Cone's request to reconsider his *Brady* claims." *Id.* 24a (emphases added).

It is difficult to imagine how the Sixth Circuit could have been more direct in its refusal to consider the merits of petitioner's federal constitutional claim in light of its (now concededly erroneous) finding of a procedural default.

b. The flaws in the State's argument do not stop there. Like the court of appeals' actual legal holdings, the Sixth Circuit's glancing observation about the merits of petitioner's claim is riddled with errors that cannot be defended. Instead, respondent merely waves that dictum as if it magically insulated the court's legal holdings from this Court's scrutiny. That is wrong for three reasons.[1]

First, even if this Court were to conclude that the court of appeals had reached the *merits* of petitioner's *Brady* claim – notwithstanding the Sixth Circuit's own repeated and pellucid disavowals of doing so and insistence that its holding is limited to the procedurally default ruling – then the merits of that *Brady* ruling would properly be before this Court, not immunized from its review. Indeed, the *Brady* issue is encompassed by the questions presented and would properly be briefed by the parties if certiorari were granted. See Pet. 30-31 n.6. The Court accordingly could properly reach the merits of the *Brady* claim itself or could otherwise dispose of the Sixth Circuit's statements as resting on legal errors.

Second, the State cannot defend the court's dicta because it assessed the *Brady* claim in a legal vac-

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[1] The single footnote in the district court's opinion briefly discussing the merits (Pet. App. 118a n.9) suffers from the same flaws.

uum in that the district court's erroneous procedural default decision prevented petitioner from developing any record in support of the merits of his *Brady* claim. See Pet. App. 41a-42a (noting that petitioner was denied a hearing in state court on his *Brady* claim); C.A. J.A. 849-882 (request for evidentiary hearing). As this Court recently reiterated, federal courts should grant habeas petitioners an evidentiary hearing when "such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007). That rule reflects the fundamental principle that prisoners should receive at least one opportunity to fully and fairly air a potentially valid constitutional claim. See *Townsend v. Sain*, 372 U.S. 293, 313 (1963). For that reason, other courts regularly require an evidentiary hearing when a habeas petitioner alleges facts that give rise to a colorable claim. *Marshall v. Hendricks*, 307 F.3d 36, 117 (3d Cir. 2002) (citing *Newell v. Hanks*, 283 F.3d 827, 838 (7th Cir. 2002); *Greer v. Mitchell*, 264 F.3d 663, 669 (6th Cir. 2001); *United States v. Johnson*, 256 F.3d 895, 898 (9th Cir. 2001) (en banc); *Valverde v. Stinson*, 224 F.3d 129, 135 (2d Cir. 2000)).[2] Indeed, this Court has cited a case requiring an evidentiary hearing to remedy an underdeveloped record as a paradigmatic example of when such a hearing is necessary. *See*

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[2] See, *e.g.*, *Morgan v. Gonzales*, 495 F.3d 1084, 1090 (9th Cir. 2007); see also *Apanovitch v. Houk*, 466 F.3d 460, 478 (6th Cir. 2006); *Graves v. Cockrell*, 351 F.3d 156, 159 (5th Cir. 2003); *Tate v. Wood*, 963 F.2d 20, 24 (2d Cir. 1992); *Cornell v. Nix*, 921 F.2d 769, 770-71 (8th Cir. 1990).

Landrigan, 127 S. Ct. at 1940 (citing *Mayes v. Gibson*, 210 F.3d 1284, 1286-87 (10th Cir. 2000)).[3]

There is no argument here – neither the court or appeals nor the State asserts – that petitioner's factual contentions were so "insubstantial" as to render an evidentiary hearing pointless. *Landrigan*, 127 S. Ct. at 1940. Thus, the district court's erroneous failure to develop a record in this case deprived the court of appeals of the factual foundation necessary to properly assess – or even improperly assess in dicta – the materiality of the *Brady* evidence in this case. See, *e.g.*, *Banks v. Dretke*, 540 U.S. 668, 675, 684-86 (2004) (describing the evidentiary hearing granted to the petitioner so that he could develop his *Brady* claim); *Herrera v. Collins*, 506 U.S. 390, 397 (1993) (noting the district court's order of an evidentiary hearing on a *Brady* claim); see also *United States v. Pelullo*, 105 F.3d 117, 123 (3d Cir. 1997) (explaining that an evaluation of *Brady* materiality "requires a[n] . . . in-depth analysis"). And absent full factual development through an evidentiary hearing, the Sixth Circuit's passing remarks on the merits of petitioner's *Brady* claim merit no weight because they lack the careful analysis of materiality conducted by this Court in *Banks*, 540 U.S. at 698-703, and *Kyles v. Whitley*, 514 U.S. 419, 441-54 (1995). The judgment accordingly should be reversed and the case remanded for the development of an appropriate factual record.

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[3] Petitioner is entitled to seek an evidentiary hearing, cf. 28 U.S.C. § 2254(e)(2), because he was "diligent in attempting to develop his claims in state court," *Williams v. Taylor*, 529 U.S. 420, 428 (2000). See Pet. 5-6.

Third, while this Court has repeatedly "stressed" that materiality must be assessed by reference to "suppressed evidence considered collectively, not item by item," *Kyles*, 514 U.S. at 436, the Sixth Circuit's brief discussion of the merits of petitioner's *Brady* claim erroneously considered the *Brady* material piecemeal and shorn of context. In its 2001 opinion, the Sixth Circuit underscored that it would "take up each category of documents *separately* and then discuss whether they are *Brady* material at all." Pet. App. 57a (emphasis added). The court's only specific analysis of materiality referred to a single witness statement in isolation and insisted without elaboration that "[t]he statement . . . does not undermine our confidence in the verdict." *Id.* 59a.

Subsequently, in its 2007 opinion, the Sixth Circuit similarly characterized the evidence as relating to "four *separate Brady* claims because [petitioner] asserts that four groups of documents were withheld from him." Pet. App. 18a (emphasis added). The court then considered and dismissed the materiality of each piece of *Brady* evidence item by item, without ever considering the collective effect of the suppressed evidence. *Id.* 25a-26a; see also Pet. 32. That approach is foreclosed by precedent. *Kyles*, 514 U.S. at 440 (reversing when court "dismiss[ed] *particular* items of evidence as immaterial and so suggest[ed] that cumulative materiality was not the touchstone") (emphasis added). Ultimately, the Sixth Circuit's abbreviated analysis was, at most, "compatible with a series of independent materiality evaluations, rather than the cumulative evaluation" required by the Sixth Amendment. *Id.* at 441. The Sixth Circuit

then compounded its error by wholly ignoring critical pieces of evidence. In particular, the 2001 opinion never discussed the materiality of Sergeant Grieco's description of petitioner "as looking 'frenzied' and 'agitated' a few days after the killings," Pet. App. 57a-58a, even though that evidence directly bolstered petitioner's claim that he committed the crimes while in the throes of an amphetamine psychosis and simultaneously would have undermined the prosecution's insistence that petitioner was not a drug addict and was not under the influence of drugs at the time of the offenses. Nor did the court consider that such observations by a police officer would likely have carried particular credibility and weight with a jury. In combination with the other *Brady* evidence, Sergeant Grieco's statement would have enhanced petitioner's sole defense at trial of mental incapacitation and his plea for leniency at his capital sentencing hearing. But no court – including the Sixth Circuit's passing dicta here – has ever considered the significance of Sergeant Grieco's statement, either on its own or combined with other withheld evidence. Thus, to the extent the court of appeals' dicta has any relevance to its judgment, that judgment should be reversed because the court's passing assessment of the merits of petitioner's *Brady* claim failed to engage in the "collective[]" analysis of the suppressed evidence required by *Kyles*, *supra*.[4]

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[4] The Sixth Circuit's discussion of petitioner's *Brady* claim in its 2007 opinion merits even less weight because the court invoked the law of the case doctrine and thus largely deferred to the exceptionally brief 2001 dicta discussing the *Brady* claim. See BIO 9-10 (noting that the 2007 opinion had concluded that

2. Finally, even putting aside the substantial and undefended errors in the dicta uttered by the court of appeals, the court was wrong to conclude that petitioner's *Brady* claim lacked merit. Petitioner's only defense at trial and his sole argument for mitigation at his capital sentencing proceeding was that he was mentally incapacitated at the time of the offenses because he was in the midst of a drug-induced psychosis. The prosecution repeatedly denied that petitioner was under the influence of drugs at the time of the killings or that he suffered from a drug addiction. See Pet. 28. Simultaneously, however, the State suppressed extensive evidence corroborating petitioner's claim of drug abuse, including eyewitness accounts of petitioner's appearance and behavior at the time of the offenses and impeachment evidence that undermined the credibility of State witnesses who contested petitioner's drug use. *Id.* 28-29; Br. for Former Prosecutors as *Amici Curiae* Supporting Pet'r [hereinafter "Prosecutors' Br."] 8-11 (summarizing withheld evidence). In addition to independently establishing petitioner's defense, a record based on this evidence would also have led a factfinder to rely on a powerful body of evidence regarding post-traumatic

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the law of the case doctrine "preclude[d] reconsideration of the 2001 determination"); see also Pet. App. 11a-12a. The court of appeals' discussion of the merits of the claim in 2007 thus does not necessarily reflect how the court of appeals would have decided the issue – or even uttered dicta – on its own. Of course, law of the case doctrine is no barrier to *this* Court's review of the judgment below. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Further, if this Court vacates the court of appeals' judgment, the law of the case doctrine would not apply to further proceedings on remand. *Johnson v. Bd. of Educ.*, 457 U.S. 52, 52-54 (1982).

stress disorder and conclude that petitioner was so afflicted. *See* Br. for Veterans for America as *Amici Curiae* Supporting Pet'r 5. Considered together, all of this evidence was favorable to petitioner, suppressed by the State, and material to guilt and to punishment. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Indeed, in agreeing with the prosecutor's argument that petitioner was a cool, deliberate killer, the Tennessee Supreme Court deemed petitioner's argument a "tenuous defense, at best," in light of the paucity of evidence presented at trial for petitioner's drug-induced psychosis defense. Pet. App. 35a (quoting *Cone v. Bell*, 665 S.W.2d 87, 90 (Tenn. 1984)). Of course, it is now clear that petitioner's sole defense seemed so tenuous to the jury and to the Tennessee Supreme Court precisely *because* the prosecutor had suppressed first-hand evidence from the mouths of the police themselves which would have corroborated and reinforced the defense. See, *e.g.*, Prosecutors' Br. 12-15.

In addition, in light of the prosecution's extensive (and successful) attempts to portray petitioner as a "calm, cool, professional," C.A. J.A. 152; Pet. 28, the withheld evidence establishing that petitioner was in a drug-induced hysteria is potent *Brady* material. Among the suppressed evidence were witness statements that petitioner "'acted real weird' and appeared to be on drugs," Pet. App. 57a, and that he "'looked wild eyed' the day before the killings," *id.* The prosecution further withheld evidence that *police officers* themselves described petitioner as a "heavy drug user," *id.* 58a, and "as looking 'frenzied' and 'agitated' a few days after the killings," *id.* 57a-58a.

The court of appeals dismissively stated that "[i]t would not have been news to the jurors, that Cone was a 'drug user.'" *Id.* 25a. But that misses the point. Whether or not the jurors knew that petitioner had used drugs in the past, the withheld evidence substantially bolstered petitioner's defense that he was in a drug-induced psychosis *when the killings occurred*, a contention the prosecution had pointedly asked the jury to reject.

In short, were a court to apply the law of procedural default as this Court has prescribed, and were a court to then analyze petitioner's *Brady* claim as this Court has directed after developing the type of record this Court has required, cumulative analysis of all of the evidence suppressed in this case that bears directly on the merits of petitioner's defense and the prosecution's theory of the case would "undermine[] confidence" in petitioner's conviction and death sentence, and requires relief on the merits. *Kyles*, 514 U.S. at 434 (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). At bottom, the question before this Court is whether petitioner should be sent to death without any court, state or federal, considering his substantial Brady claim on its merits, just because the court of appeals uttered legally and factually indefensible dicta in the course of issuing two legally indefensible rulings refusing to hear his claim. If, as here, the State cannot stomach defending either the court's holdings or the court's dicta, either plenary review, summary reversal, or vacatur for reconsideration in light of controlling precedent is mandated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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MAY 2008

AMICUS CURIAE BRIEF

89

FILED
MAR 28 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 07-1114

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,
v.
RICKY BELL, WARDEN
Respondent.

On Petition for a Writ Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICI CURIAE* FORMER PROSECUTORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former prosecutors, identified in the Appendix, who have a continuing interest in the fair and effective functioning of the criminal justice system. *Amici* believe that, in order for that system to achieve its objective of promoting the administration of justice, prosecutors must perform their official responsibilities in strict conformance with applicable standards of conduct and fairness, including their overarching duty "to seek justice, not merely to convict." *ABA Standards for Criminal Justice* 3-1.2(c), at 4 (3d ed. 1993) (*ABA Crim. Justice Stds.*). As this Court has explained, the prosecutor is "the representative of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, "[a]lthough the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." *ABA Crim. Justice Stds.* 3-1.2 cmt., at 5.

A fundamental component of the prosecutor's duty to act "as a minister of justice and not simply [as] an advocate" is the obligation to ensure the "consideration of exculpatory evidence known to the prosecution." *ABA Crim. Justice Stds.* 3-3.11 cmt.,

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[1] The parties have given their written consent to the filing of this brief. In accordance with Rule 37.6, counsel for *amici curiae* state that no counsel for either party authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

at 82; *see* ABA, Model Code of Prof'l Responsibility DR 7-103(B). The prosecutor's obligation to disclose exculpatory evidence to the defense is embodied in the constitutional requirements set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

In addition, non-constitutional standards requiring the disclosure of exculpatory evidence generally "go[] beyond the corollary duty upon prosecutors imposed by constitutional law." *ABA Crim. Justice Stds.* 3-3.11 cmt., at 82; *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also, e.g.*, Tenn. R. Prof'l Conduct 3.8(d) (requiring "timely disclosure . . . of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"). Those duties concerning the disclosure of evidence favorable to the defense apply to the determination of the appropriate sentence no less than to the determination of guilt or innocence. *See ABA Crim. Justice Stds.* 3-6.2(b); *id.* 3-6.2 cmt., at 116 ("As a minister of justice, the prosecutor also has the specific obligation to see that the convicted defendant continues to be accorded procedural justice and that a fair sentence is imposed upon the basis of appropriate evidence, including consideration . . . of exculpatory information known to the prosecutor."); *see also* Tenn. R. Prof'l Conduct 3.8(d) (requiring disclosure of "all unprivileged mitigating information" "in connection with sentencing").

The prosecution's overarching duty to serve justice—rather than merely to win a case—of course extends to appellate and post-conviction proceedings, the very object of which is to assure the fairness of the trial and the reliability of the result. Of particular relevance here, the prosecution has a duty of

candor to all courts, including appellate and post-conviction courts. *See ABA Crim. Justice Stds.* 3-2.8(a) ("A prosecutor should not intentionally misrepresent matters of fact or law to the court."). The prosecutor, that is, "must be scrupulously candid and truthful in his or her representations in respect to any matter before the court. This is not only a basic ethical requirement, but is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice." *Id.* 3-2.8 cmt., at 36 (footnote omitted). Accordingly, it is *amici*'s experience that courts considering claims for appellate or post-conviction relief rely on the prosecution to provide an objective and forthright description of the proceedings under review. And the prosecution's responsibility in that regard is especially pronounced in the context of post-conviction review of capital convictions and sentences. That is not only because of the magnitude of the interests at stake, but also because such cases typically involve a multitude of claims, a highly complicated procedural history, and an intricate set of waiver and default principles governing the consideration of claims. Those factors combined place a substantial premium on the reviewing court's ability to understand completely and accurately what has transpired to date.

In this case, the prosecution failed to disclose to the defense exculpatory evidence that was in the prosecution's possession. The undisclosed evidence bore directly on the sole defense raised by petitioner at trial and sentencing—*viz.*, that petitioner, during his commission of the charged conduct, was mentally incapacitated as the result of his drug addiction. Then, when petitioner subsequently discovered the

prosecution's failure to disclose the exculpatory evidence and sought in post-conviction proceedings to raise a *Brady* challenge, the prosecution failed to give a complete and accurate procedural history of the claim that would have assisted the post-conviction courts in addressing its merits. As a result, unless this Court grants review, petitioner may be executed with *no* court having adequately considered the merits of his substantial claim that the prosecution failed to abide by its obligation to disclose to him exculpatory information that had a reasonable likelihood of affecting the result of his trial or sentence.

Amici fully agree with the reasons stated by petitioner for granting certiorari in this case. In addition, however, *amici* believe that the conduct of the prosecution in the proceedings to date—both in the trial proceedings by failing to disclose evidence favorable to petitioner, and then in post-conviction proceedings by failing to give a full and accurate account of the procedural history—affords added reason for this Court to grant review. The ability of the criminal process to promote the administration of justice turns in substantial measure on the prosecution's strict adherence to its special obligation to seek justice, rather than merely to obtain a conviction and to protect that result in post-conviction proceedings. This Court should grant certiorari to ensure that those vital principles are vindicated here.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner was convicted of capital murder and sentenced to death based on a crime spree that took

place on August 9-10, 1980. Petitioner robbed a jewelry store, and later killed a couple in their home. Petitioner did not dispute that he had committed the conduct with which he was charged. He instead raised as his sole defense that he was mentally incapacitated at the time because his drug addiction had induced an amphetamine psychosis. Petitioner sought leniency in his capital sentencing hearing on the same basis. The prosecution vigorously disputed that petitioner was a drug addict or was otherwise under the influence of drugs at the time of the offenses.

Throughout the trial and sentencing phases, however, the prosecution had withheld from the defense substantial exculpatory evidence of petitioner's drug addiction, including eyewitness descriptions of petitioner's condition around the time of the crimes that supported his argument that he was acting under the influence of drugs. That evidence first came to light during petitioner's post-conviction proceedings, at which point petitioner timely raised a *Brady* claim. The state courts nonetheless declined to examine the claim, erroneously (and inexplicably) concluding that it had already been resolved against petitioner in prior proceedings—when the evidence supporting the claim in fact had not even come to light when those proceedings occurred. In the federal habeas proceedings below, the State did not defend the state courts' erroneous conclusion that the *Brady* claim had previously been resolved against petitioner, but instead argued the direct opposite—that petitioner had never even *raised* his *Brady* claim in the state court proceedings. The State's argument in that regard was characterized by the dis-

senting judges below as a blatant falsehood. Pet. App. 2a, 39a.

The upshot is that no court—state or federal—has yet given adequate consideration to petitioner's *Brady* claim on the merits, even though that claim raises serious questions about the fairness of petitioner's trial and the reliability of his sentence. *Amici* believe that the prosecution's failure to disclose exculpatory evidence to the defense in connection with petitioner's trial and capital sentencing proceedings, coupled with the prosecution's failure to give a complete and accurate account of the procedural history of that claim in petitioner's post-conviction proceedings, support the grant of certiorari in this case.

ARGUMENT

A. The Prosecution Failed To Disclose Exculpatory Evidence Directly Related To Petitioner's Defense And To His Case For Leniency At Sentencing.

1. From the time of opening statements at his trial, petitioner raised "only one" defense to the charges against him—that, while he had committed the conduct giving rise to the charges, he did so while in a drug-induced psychosis related to his post-traumatic stress from military service. JA 133.[2] Petitioner presented the testimony of a clinical psychologist and neuro-pharmacologist, who testified that petitioner suffered from a serious drug abuse disorder that had developed into a chronic amphetamine psychosis. *State v. Cone*, 665 S.W.2d 87, 92 (Tenn. 1984); Pet. 3. In closing arguments, peti-

[2] Citations to the Joint Appendix filed in the court of appeals below take the form "JA [page]."

tioner's counsel told the jury that the "only one issue in this entire lawsuit" was whether petitioner was "sane under the law," and argued as to that issue that petitioner was "an addict out of control" with "no ability to reason." JA 133-34.

The prosecution strongly disputed petitioner's claim that he was addicted to drugs or under the influence of drugs at the time of the crimes. The officer who processed petitioner after his arrest, Sergeant Ralph Roby, testified that he saw no indication of petitioner's drug use. Pet. 3, 29; Pet. App. 36a. An FBI agent who interviewed petitioner after his arrest, Eugene Flynn, similarly testified that petitioner exhibited no sign of mental illness or drug addiction. Pet. 3, 29; Pet. App. 37a. And an acquaintance of petitioner, Irene Blankman, testified that she was with him one day after the murders and that he used no drugs in her presence and showed no sign of recent drug use. *See Bell v. Cone*, 535 U.S. 605, 705 (2002) (Stevens, J., dissenting); *Cone*, 665 S.W.2d at 91; Pet. 3-4, 29. The prosecutor argued to the jury that petitioner's claim that he was "a drug addict" was "balony," Pet. 3, contended that the drugs and large amount of money found in petitioner's car suggested that petitioner was a "drug seller" rather than a drug user, Pet. 28; JA 146, and asked the jury to focus on the testimony of the witnesses who "had the opportunity to hear from [petitioner or] who saw him in or around the time of the offense," which showed petitioner to be "a calm, cool professional robber" rather than in a drug-induced psychosis. JA 151-52.

In subsequently arguing in the capital sentencing hearing that petitioner's life should be spared, peti-

tioner's counsel referred the jury to the guilt-phase evidence and reiterated the defense position that petitioner was a "junkie and drug addict" and had a diminished mental state at the time of the crimes. Punishment and Sentencing Hearing Tr. 2117 (Apr. 23, 1982); *see* Pet. 4; *Bell*, 535 U.S. at 691 (majority opinion), *id.* at 713 (Stevens, J., dissenting). The jury disagreed and imposed a sentence of death. In affirming petitioner's capital sentence and conviction, the Tennessee Supreme Court emphasized the lack of evidence supporting petitioner's argument that he was acting under the influence of drugs at the time of the crimes. The court explained that "neither of the expert witnesses who testified on [petitioner's] behalf had ever seen or heard of him until a few weeks prior to the trial"; that their testimony had been "based purely upon his personal recitation to them of his history of military service and drug abuse"; that "[l]ay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to . . . his drug abuse"; and, in particular, that the three prosecution witnesses "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question." *Cone*, 665 S.W.2d at 90, 93.

2. During the proceedings on petitioner's second petition for state post-conviction relief, petitioner learned for the first time that the prosecution had failed to disclose evidence and information that directly supported his claim that he was a drug addict and was acting under the influence of drugs at the time of the crimes. That evidence included:

a. An incident report containing the state-

ments of witnesses Charles and Debbie Slaughter, who stated that petitioner "looked wild eyed" the day before the homicides. JA 1171.

b. A witness statement responding affirmatively to the question whether petitioner appeared "to be drunk or high on anything" when he robbed a store two days before the murders, and stating: "Well he did, he acted real weird that is the reason I watched him." JA 1809.

c. A police report describing petitioner as "looking about in a frenzied manner" and appearing "agitated" a few days after the killings. Pet. App. 58a; JA 1919.

d. A supplemental report, made one day after the murders by a police officer investigating the crimes, stating that petitioner "was a heavy drug user." District Attorney File 1030.

The prosecution also withheld additional evidence supporting petitioner's claim that he was a drug addict and rebutting the prosecution's argument that petitioner was a "drug seller" rather than a drug user—evidence that also could have been used to impeach the testimony of Sergeant Roby and Agent Flynn:

a. A law enforcement teletype system memo authorized by Sergeant Roby and dated August 12, 1980, which states that petitioner "is a heavy drug user"; two law enforcement teletype system memos authorized by Sergeant Roby and dated August 11, 1980, which de-

scribe petitioner as a "drug user"; and a statement made by petitioner's sister to Sergeant Roby on August 23, 1980, that petitioner had "a severe psychological problem" and "needed to work on his drug problem." JA 513, 515; Pet. 29.

b. An FBI "Fugitive Index" form (FD-65), apparently authorized by Agent Flynn (Pet. 29), providing as "additional pertinent information" that petitioner is a "DRUG USER"; multiple teletypes issued by the FBI from August 12, 1980 to August 15, 1980, describing petitioner as a "drug user" and as a "heavy drug user"; and an FBI teletype dated August 13, 1980, stating that petitioner was found "in possession of 850 amphetamine pills" when previously in prison. JA 526-28, 535, 537, 549.

Finally, the prosecution withheld information that could have been used to impeach the testimony of Ilene Blankman, who testified that she had seen petitioner one day after the murders and that he had no needle marks on his body and exhibited no indication of drug abuse:

a. Notes of a pretrial interview with Blankman in which she failed to reveal, as she later testified at trial, that petitioner had slept in her bed two days after the murders, that she had seen petitioner unclothed at that time, or that she had seen no needle marks on petitioner's arms. Pet. 29.

b. Files indicating that Blankman was the only state witness to receive a thank-you let-

ter and showing that she had had numerous contacts with the prosecution. Pet. 29.

The prosecution should have disclosed the exculpatory and impeachment evidence to petitioner. As this Court has explained, "[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Prejudice exists when the evidence withheld is "material either to guilt or punishment," *Brady*, 373 U.S. at 87, and the "touchstone" of the materiality inquiry is whether disclosure of the evidence would have given rise to a "reasonable probability of a different result." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The question, in other words, is whether the evidence "undermine[s] confidence" in the verdict or sentence. *Id.* at 435.

A prosecutor's assessment of whether *Brady* requires disclosure of evidence can turn in certain situations on difficult judgments about materiality. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) (recognizing that the standard is "inevitably imprecise" and that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"), *rev'd on other grounds by United States v. Bagley*, 473 U.S. 667, 682 (1985). For precisely that reason, however, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* As the Court has recognized, "[t]his means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable

piece of evidence." *Kyles*, 514 U.S. at 439. "This is as it should be," the Court has explained, given the prosecutor's status as "'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Accordingly, non-constitutional standards of conduct for prosecutors contemplate a broader range of disclosure than is compelled by the constitutional floor of *Brady*, "call[ing] generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Id.* at 437; *see* p. 2, *supra*.

The evidence in this case should have been disclosed under any standard. That evidence bore directly on the sole defense raised by petitioner at trial and on his argument for leniency in his capital sentencing hearing. The importance of the withheld evidence may be "best understood by taking the word of the prosecutor," as this Court did in *Kyles*, 514 U.S. at 444. The prosecutor's closing argument urged the jury to judge petitioner's mental state by "[w]hat . . . [the people] who saw [petitioner] in or around the time of offense had to say," JA 151-52—evidence that petitioner would have had if the prosecution had disclosed it. *See United States v. Udechukwu*, 11 F.3d 1101, 1105 (1st Cir. 1993) ("We have no doubt . . . that the prosecutor's persistent theme in closing argument suggesting the nonexistence of this information—and even the opposite of what the government knew—did fatally taint the trial."); *see also Bailey v. Rae*, 339 F.3d 1107, 1117 (9th Cir. 2003) (suppression was "all the more alarming given that the State . . . later showcased to the

jury the defense's paucity of evidence" on the issue). The prosecutor's argument to that effect was reinforced by the Tennessee Supreme Court, which contrasted the lack of evidence introduced by petitioner concerning his condition at the time of the crimes with the testimony of the three witnesses for the prosecution, who "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question." *Cone*, 665 S.W.2d at 93.

The evidentiary picture on that critical issue at trial and at sentencing would have looked far different had it included: (i) eyewitness statements that petitioner, around the time of the crimes, appeared "real weird" and on drugs, "wild-eyed," "frenzied" and "agitated," rebutting the prosecutor's characterization of petitioner as a "calm, cool professional robber"; (ii) multiple police bulletins contemporaneously describing petitioner as a "heavy drug user" or a "drug user," rebutting the prosecutor's argument that any suggestion of petitioner's drug addiction was "balony" and that he was a drug seller rather than a drug user; and (iii) substantial information with which to impeach the testimony of each of the prosecution's three witnesses about their impression of petitioner's condition soon after his crime spree.[3]

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[3] It is unlikely, for instance, that Ilene Blankman's testimony would have stood up well to cross-examination had defense counsel known that she had been the subject of special attention from the State or that key parts of her testimony had come out for the first time at trial rather than in her initial interview by prosecutors. Likewise, the testimony of Sergeant Roby and Agent Flynn suggesting that petitioner did not use drugs and was not "out of his mind" shortly after the crimes

In short, each of the documents suppressed by the prosecution in one way or another supported petitioner's claim that he committed the crimes in a state of drug-induced psychosis. The significance of the withheld evidence is particularly evident with respect to petitioner's capital sentencing proceeding. The conclusion of any one juror that petitioner's life should have been spared because he may have been acting under the influence of drugs and post-traumatic stress at the time of the crimes would have precluded imposition of a capital sentence.

For the reasons explained by petitioner, Pet. 10, 30-34, and as Judge Merritt understood below, Pet. App. 46a, the court of appeals conducted no meaningful assessment of the significance of the withheld evidence. Indeed, the court of appeals' perfunctory analysis of that evidence, *see* Pet. App. 25a-26a, only reinforces the need for a complete and adequate assessment of materiality by some court. The court of appeals asserted that the jurors "had already heard substantial direct evidence that [petitioner] was a 'drug user.'" *Id.* But as the prosecutor himself argued to the jury, and as the Tennessee Supreme Court reiterated in affirming petitioner's conviction and sentence, there is a world of difference between testimony describing petitioner's condition and appearance at the time of the crimes, on one hand, and testimony based solely on his own statements years after the fact, on the other. The prosecution pre-

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were committed likely would have been substantially undermined had defense counsel been armed with the information that both witnesses had authored or authorized several reports contemporaneously describing petitioner as a "drug user" or "heavy drug user."

sented the former, and by failing to disclose evidence favorable to petitioner, left him to rely solely on the latter.

B. The Prosecution Did Not Give A Complete And Accurate Account In Post-Conviction Proceedings Of The Procedural History Of Petitioner's *Brady* Claim.

The prosecution not only failed at trial to disclose evidence directly supporting the core of petitioner's defense and his argument to be spared a capital sentence, but the prosecution then failed in post-conviction proceedings to give a full and accurate description of the procedural history of petitioner's resulting *Brady* claim. Consequently, petitioner first was denied the opportunity at trial and sentencing to present critical evidence supporting his position, and, when he later discovered the prosecution's failure to disclose that evidence and sought relief on that basis, he was then denied the opportunity in post-conviction proceedings to have a court meaningfully address the merits of his claim.

1. Petitioner did not learn of the exculpatory evidence possessed and withheld by the prosecution until after he had filed his second amended petition for post-conviction review in state court. He then, in October 1993, filed a new amendment to the petition adding a paragraph 41, alleging that the State had "withheld exculpatory evidence which demonstrated that petitioner . . . did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past." JA 2006; Pet. App. 40a (emphasis omitted). Petitioner stated that the evidence "includ[ed], but [was] not limited to, state-

ments of Charles and Debbie Slaughter," as well as "statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollections of officers and others." JA 2006. Petitioner also submitted an affidavit explaining that he "did not know of the existence of this claim in earlier proceedings, including post-conviction proceedings," and that the "facts ha[d] been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding." JA 2045-46.

The trial court later denied the amended petition for post-conviction relief. While the court did not separately discuss petitioner's new *Brady* claim, the court explicitly identified that claim (*i.e.*, ¶ 41, JA 2045-46), in a list of claims that it rejected on the ground that they had been "re-statements of grounds heretofore determined and denied" on direct appeal or in prior post-conviction proceedings. *Cone v. State*, P-06874, slip. op. at 6 (Tenn. Crim. Ct. Dec. 16, 1993). The court also added summarily that any "grounds not previously determined are presumptively waived." *Id.* at 7. The trial court's conclusion that the *Brady* claim in paragraph 41 had been previously determined was plainly erroneous: that claim, far from having been previously determined, in fact had never before been raised.

Notwithstanding the trial court's clear error in finding petitioner's *Brady* claim previously determined, the Tennessee Court of Criminal Appeals affirmed. The court's brief opinion did not separately address petitioner's claims but instead summarily observed that the trial court had found that "most of [petitioner's] stated grounds for relief . . . were pre-

viously determined." JA 2000. The court then stated in its "conclusion" that petitioner had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." JA 2002.

When petitioner again raised his *Brady* claim in his federal habeas petition, the State answered that petitioner was barred from raising that claim by an adequate and independent state ground. The State contended that the Tennessee Court of Criminal Appeals had found that the *Brady* claim was waived, relying on that court's concluding statement that petitioner had "waived all claims" that "had not been previously determined." JA 645-46 (quotation omitted). In fact, however, the state trial court had explicitly (albeit erroneously) concluded that petitioner's *Brady* claim had been previously determined—not that it had been waived—and the Tennessee Court of Criminal Appeals affirmed without suggesting any disagreement on that score. To be sure, the Court of Criminal Appeals had stated conclusorily that some of petitioner's claims were waived. But nothing in its opinion suggests that the court believed that petitioner's *Brady* claim fell in that category.[4] Rather, the circumstances make plain that both state courts found petitioners' *Brady* claim to have been previously determined, not to have been waived. *See* Pet. App. 22a (concluding the "Tennessee courts held that [petitioner's] *Brady* claims were previously determined," not waived).

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[4] As petitioner explains, the state courts could not have concluded that the *Brady* claim had been waived. *See* Pet. 5-6 & n.1.

In the proceedings in the court of appeals below, the State asserted that petitioner's "*Brady* claims were simply never raised in the state court," arguing that petitioner had made "[o]nly a conclusory attempt . . . to raise the allegations in his second-post conviction petition and not the specific claims as now alleged." State Ct. App. Br. 13 (Feb. 8, 2000). In support of that argument, however, the State cited only the version of the second amended petition for post-conviction relief that had been in effect *before* petitioner had again amended the petition to add paragraph 41. *Id.* at 13 n.7. That new paragraph, directly contrary to the State's argument, plainly *did* raise petitioner's *Brady* claim with substantial specificity (and not merely in a conclusory fashion).[5]

2. Thus, rather than assisting the post-conviction courts in their understanding of the procedural history of petitioner's case, the State's characterization of the procedural history confused the issue and impeded the courts' consideration of the merits of petitioner's *Brady* claim. Judge Merritt concluded, in dissenting from the panel disposition, that the State's arguments in that regard amounted to "misrepresentations," "unacceptable conduct," a "complete falsification of the procedural record," and "a deliberate falsehood." Pet. App. 33a, 39a-40a. Six additional judges joined Judge Merritt in concluding, in his opinion dissenting from the denial of en banc rehearing, that the State's claim of waiver was "bla-

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[5] Indeed, the State appeared essentially to acknowledge, in its response to the en banc petition, that its failure to discuss (or even cite) paragraph 41 in its brief before the panel had been misleading. State Opp. to Pet. for Reh'g 6-7 & n.7 (Aug. 3, 2007).

tantly false." Pet. App. 2a. And even assuming that the State did not deliberately seek to mischaracterize the procedural history concerning petitioner's *Brady* claim, the State's account of that procedural history, at the least, was less than fully accurate and complete.

The prosecution, however, is held to an especially high standard when communicating with the courts on such matters. *See ABA Crim. Justice Stds.* 3-2.8(a). The prosecutor "must be scrupulously candid and truthful in his or her representations in respect to any matter before the court. This is not only a basic ethical requirement, but is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice." *Id.* 3-2.8 cmt., at 36 (footnote omitted); *see United States v. Casas*, 425 F.3d 23, 40-41 (1st Cir. 2005) ("Prosecutors have a duty of candor to the court."); *cf. Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 358 (1963) (recognizing that attorneys for the government have an "unqualified duty of scrupulous candor . . . in all dealings with th[e] Court"). The need for the prosecution to provide a fully objective and complete description of the procedural history of the claims under review is at its premium in the context of post-conviction review of capital sentences. In light of the magnitude of the interests, the multitude of claims, the highly complicated procedural history, and the equally complicated procedural rules concerning waiver and default that typify that context, it is essential that courts be able to rely on the prosecution to provide an entirely complete and accurate description of the proceedings under review.

The dissent below therefore should not have had to engage in what the majority described as an "impressively close scrutiny of [an] enormous state court record," Pet. App. 24a, to gain an accurate understanding of what had transpired in this case. That understanding instead should have been supplied in the first instance by the prosecution. Especially if the prosecution has withheld exculpatory evidence in denial of the defendant's rights at trial, the prosecution should not compound the error by making inaccurate statements that may deny the defendant an opportunity to have his claim heard in post-conviction proceedings. Regardless of whether the prosecution's post-conviction conduct in this case was intentionally misleading, it has confused the issue for so long that, almost a dozen opinions after petitioner initially (and properly) raised his *Brady* claim, that claim still has not received the full consideration on the merits that it warrants.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the Court should grant the petition.

Respectfully submitted,

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APPENDIX A

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AMICUS CURIAE BRIEF

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FILED
MAR 28 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1114

IN THE
Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* VETERANS FOR AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Veterans for America is a nonprofit advocacy and humanitarian organization that unites the newest generation of military veterans with those from past wars to advance policies favorable to veterans and elevate public discourse regarding the causes, the conduct and, particularly, the consequences of war. Veterans for America has a direct interest in the questions presented in this case. Although the specific issues presented in the petition deal with the proper scope of federal postconviction review, the substantive question ultimately at issue in this case is a matter of surpassing importance to Veterans for America – the debilitating and often tragic effects of posttraumatic stress disorder that so many of our nation's combat veterans suffer, and the relevance of that disorder to a proper assessment of their culpability in criminal cases.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than Veterans for America and their counsel made a monetary contribution to the preparation or submission of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. Petitioner has filed blanket consent for this filing. Respondent has also consented, and pursuant to Rule 37.3, Veterans for America has filed the letter of consent with the Clerk of the Court. Veterans for America provided notice to Respondent of its intent to file this brief on March 27, 2008. Although Respondent did not receive notice of the intended filing within 10 days of the due date of the brief in opposition, it is the undersigned counsel's understanding that Respondent did receive notice of the intention of another party to file an amicus brief within that time period, and thus had an opportunity to seek additional time to file its brief in opposition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for certiorari sets forth, with crystalline clarity, the two ways in which the Sixth Circuit's decision in this case conflicts directly with decisions of this Court and of other courts of appeals on matters of fundamental importance. The rule articulated and applied by the Sixth Circuit – that federal postconviction review is procedurally barred when a state postconviction court refuses to consider an issue that has been "previously determined" on the merits by the state courts – flatly contravenes the holding of this Court in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). The Sixth Circuit holding also conflicts with the prevailing law in other circuits, which uniformly recognize that a state court's "previous determination" of the merits of a federal constitutional claim supports federal postconviction review, rather than forecloses it. Likewise, the Sixth Circuit's decision deepens an existing circuit conflict with respect to the question whether a federal court exercising postconviction review can look behind a state court determination of procedural default and evaluate the adequacy and independence of a state's asserted procedural bar.

Review of these questions is manifestly appropriate not merely because it would be a grave injustice to allow Petitioner Cone to be put to death without any court having considered the substance of his claim under *Brady v. Maryland*, 373 U.S. 83 (1963), but also because the articulation of uniform national rules to govern the questions raised in the petition is a matter of systemic importance.

In this brief, Veterans for America will not repeat or amplify the arguments for review set forth in the petition. Instead, we respectfully submit this brief to ensure that the Court understands that Petitioner's *Brady* claim is a powerful one on the merits, and that this case is therefore an appropriate vehicle for addressing the questions presented in the petition; there exists a very real prospect that Petitioner Cone will achieve the relief he seeks if he is given his day in federal court on the *Brady* claim. As we will demonstrate below, the substance of the defense that Cone raised both to the charge of murder and to the State's request for a death sentence – that he should not be held fully culpable because he suffers from posttraumatic stress disorder brought on by his military service, which was exacerbated by a serious drug addiction – is one that finds strong support in a well-developed body of empirical evidence, as well as decades of practical experience on the part of entities such as Veterans for America.

The sad but undeniable truth is that thousands of this nation's veterans bear the emotional and psychological scars of their battlefield service to their country – with posttraumatic stress disorder ("PTSD") chief among their afflictions. Even worse, veterans suffering from PTSD often turn to substance abuse to deaden their symptoms, bringing on a vicious cycle of self-destructive behavior. Regrettably, violence is one frequent manifestation of PTSD in the veteran population, particularly among substance abusers. A just assessment of criminal culpability requires that the nature and effects of PTSD be taken into account.

That is particularly true in this case. In seeking to win a conviction and death sentence, the prosecution did not deny that PTSD, particularly as exacerbated by the type of serious substance abuse that it so often brings about, could theoretically preclude a finding of the necessary *mens rea* or justify a "reasoned moral response" that a death sentence would be disproportionately severe. *See generally Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Instead, the prosecution challenged Cone's assertion that he suffered from PTSD and, in particular, that he was in a state of amphetamine psychosis at the time of the crime. *See* Pet. at 3-4 (detailing trial evidence presented by Cone regarding his diagnosis of PTSD and substance dependence, along with the State's response). As the prosecution would have it, Cone was not a drug user at all, much less a person suffering from a chronic addiction to powerful amphetamines that began during his service in Vietnam and deepened over time as a consequence of his PTSD.

Thus, it was particularly shocking when subsequent discovery revealed that prosecutors had suppressed exculpatory evidence that flatly contradicted the prosecution's trial strategy – evidence confirming that the authorities believed Cone to be not merely a "heavy drug user," but also a person who was generally dangerous and who appeared "frenzied" and "wild-eyed." *See* Pet. at 5-6 (describing a "wide array" of suppressed evidence that "bore directly on petitioner's defense and argument in mitigation"). This body of concealed evidence is plainly material to the core issue of

Cone's culpability. It is directly relevant to his principal defense to the charge of murder. And, it is equally relevant to the sentencers' assessment of whether Cone should have received the death penalty. The fact is that Cone's psychological make-up, his addiction to powerful amphetamines, and the criminal acts of which he was accused are all completely consistent with a diagnosis of PTSD, which is hardly surprising given Cone's traumatic combat experience in Vietnam.

As will be developed below, the PTSD-based defense that Cone sought to put forth at trial and at sentencing is well supported by a significant body of evidence. That defense should have received full and fair consideration by the jury that convicted and sentenced him. The prosecution, however, deprived the jury of the opportunity to give appropriate consideration to Cone's defense by suppressing evidence that directly supported that defense and that squarely contradicted the prosecution's statements to the jury that Cone was not a drug user at all, much less one suffering from the debilitating effects of PTSD. Because this evidence is material under any reasonable reading of *Brady*, there is every reason to think that Cone would obtain relief were he given the opportunity to adjudicate his *Brady* claim. For that reason, this case is a manifestly appropriate vehicle to consider the threshold questions Cone has raised in his petition for certiorari.

ARGUMENT

I. The Prevalence of Posttraumatic Stress Disorder, Often Combined With Substance Abuse, Is Strikingly High In Veterans.

As far back as Sophocles' *Ajax*, commentators have documented the depression, anger, and gloom that plague many soldiers long after they have returned from war. Similar perceptions about the frequency and severity of these symptoms prompted the United States to establish "the first military hospital for the insane in 1863," during the Civil War. Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190/191 Mil. L. Rev. 67, 70 (Winter 2006/Spring 2007). The problem received sustained attention from the relevant professional communities after the Vietnam War, leading to the official diagnostic classification of the disorder; the American Psychiatric Association listed PTSD in its *Diagnostic and Statistical Manual of Mental Disorders*, published in 1980 ("DSM-III").[2]

As the National Center for PTSD explains, the symptoms of PTSD can "disrupt" the lives of those afflicted with the condition, "making it hard to continue with . . . daily activities." National Center for PTSD, *Fact Sheet: What is Posttraumatic Stress Disorder (PTSD)*, *available at* http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_what_is_ptsd.html (last visited Mar. 27, 2008). The disorder is common in veterans. In fact, Congress was so concerned about the prevalence of PTSD after

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[2] Thus, PTSD was a clinically recognized disorder at the time Cone was convicted in 1982.

the Vietnam War that it commissioned the National Vietnam Veterans' Readjustment Study "for an investigation of posttraumatic stress disorder (PTSD) and other postwar psychological problems among Vietnam veterans" – the largest such study to date. Jennifer L. Price, National Center for PTSD, *Fact Sheet: Findings from the National Vietnam Veterans' Readjustment Study*, *available at* http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_nvvrs.html?opm=1&rr=rr45&srt=d&echorr=true (last visited Mar. 27, 2008).

Individuals suffering from PTSD often relive the combat trauma in incidents commonly referred to as "flashbacks." *See* Dr. Matthew Jaremko, Testimony in *State v. Cone*, Trial Tr. 1671-72. PTSD also often causes an emotional and social distancing from society, and consequently, from the values held in civil society. *Id.* Finally, PTSD frequently leads to stress-related symptoms, such as depression, nervousness, and sleep disorders. *Id.*

Individuals with PTSD may also suffer from other disorders, including drinking or drug problems. *See* PTSD, *Fact Sheet: What is Posttraumatic Stress Disorder*, *supra*. According to one study, "[i]ncidence estimates suggest the rates of [substance abuse] among persons with PTSD may be as high as 60%-80%. . ." Beverly Donovan & Edgardo Padin-Rivera, *Transcend: A Program for Treating PTSD and Substance Abuse in Vietnam Combat Veterans*, 8 Nat'l Ctr. for Post-Traumatic Stress Disorder Clinical Q. 51, 51 (Summer 1999). The common explanation for this high occurrence of substance abuse is the drive to "self-medicate" to treat the

symptoms and effects of PTSD. *See* Casey T. Taft, et al., *Posttraumatic Stress Disorder Symptoms, Physiological Reactivity, Alcohol Problems, and Aggression Among Military Veterans*, 116 J. Abnormal Psychol. 498, 499 (2007) (discussing self-medication and violence among those suffering from PTSD and alcohol abuse).

The impulse to self-medicate is especially high among those suffering from PTSD as a result of combat trauma. Describing a typical example of the phenomenon, professionals treating veteran-sufferers detailed, "John witnessed many atrocities during combat in Vietnam . . . Upon returning home, John often felt depressed and fearful; he was continuously agitated and always searched for the slightest sign of harm. He turned to heroin to shut out the pain." Patrick M. Reilly, H. Westley Clark, & Michael S. Shopshire, *Anger Management and PTSD: Engaging Substance Abuse Patients in Long-Term Treatment*, 6 Nat'l Ctr. for Post-Traumatic Stress Disorder Clinical Q. 68, 68 (Summer 1996). "As with many Vietnam-combat veterans, John avoided addressing traumatic incident by using drugs and alcohol." *Id.* This story reflects the experience of many: "According to the National Vietnam Veterans Readjustment Study, Vietnam veterans with PTSD are six times more likely to abuse drugs compared to Vietnam veterans without PTSD." *Id.*

Often those suffering from PTSD enter a dangerously addictive cycle. They suffer the symptoms of their disease, and then treat those symptoms through substance abuse, which only

exacerbates their distance from society and amplifies propensities towards depression, anger, and violence. The particular maladies at the heart of Mr. Cone's case, therefore, are far from "balony [*sic*]." Pet. at 3 (citing CA6 J.A. 124). Rather, the compounded effects of PTSD and substance abuse, and their prevalence in war veterans, is well-documented and serious, and there is every reason to think that Petitioner Cone was afflicted with the disorder.

II. PTSD, Particularly When Compounded By Substance Abuse, Is Directly Linked To An Increased Risk of Violent Crime.

PTSD, particularly when combined with drug and alcohol abuse, is associated with an increased proclivity for anger and violence. As the National Center for PTSD has explained, "[t]rauma can be connected with anger in many ways. After a trauma people often feel that the situation was unfair or unjust. They can't comprehend why the event has happened and why it has happened to them. These thoughts can result in intense anger." National Center for PTSD, *Fact Sheet: Common Reactions After Trauma*, *available at* http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_commonreactions.html (last visited Mar. 27, 2008). This anger can be linked to the PTSD symptom known as hyperarousal. *See* PTSD, *Fact Sheet: What is Posttraumatic Stress Disorder*, *supra*. Individuals suffering from hyperarousal "may be jittery, or always alert and on the lookout for danger." *Id.* These feelings can cause irritability, anger, and even rage. *See* National Center for PTSD, *Fact Sheet: War-Zone Related Stress*

Reactions: What Veterans Need to Know, *available at* http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/war_veteran.html?opm=1&rr=rr126&srt=d&echorr=true (last visited Mar. 28, 2008).

Hyperarousal can cause sufferers to feel "out of control. When it attains levels of intense arousal, it can be profoundly troubling to the person having the anger experience." Raymond W. Novaco, *Anger Treatment and Its Special Challenges*, 6 Nat'l Ctr. for Post-Traumatic Stress Disorder Clinical Q. 56, 58 (Summer 1996). Not surprisingly, uncontrollable anger often causes snap reactions, leading to violence and criminal acts.

Substance abuse exacerbates these effects. *See* Taft, et al., *Posttraumatic Stress*, 116 J. Abnormal Psychol. at 504 ("[H]yperarousal symptoms were associated with a greater frequency of aggression through their relationship with alcohol problems"). PTSD limits an individual's ability to control his responses to anger stimuli, and drugs and alcohol further limit the individual's capacity to deal with feelings of anger. Thus, those suffering from a combination of PTSD and substance dependence are particularly prone to commit violent acts as a result of impulses that they cannot fully control.

This risk is also elevated when those suffering from PTSD exhibit psychotic symptoms. One study found that "as many as 35% of treatment seeking veterans with PTSD may also experience psychotic symptoms that are distinct from PTSD-related perceptual disturbances (e.g., flashbacks, trauma-specific hallucinations, disassociation), and this

population represents a group of trauma survivors with significant vulnerabilities." Madeline Uddo, Frederick Sautter, & Larry Pardue, *Treatment of PTSD with Psychotic Symptoms*, 8 Nat'l Ctr. for Post-Traumatic Stress Disorder Clinical Q. 14, 14 (Winter 1998). Another study of male veterans in an inpatient PTSD facility found the numbers suffering from psychotic symptoms to be even greater: The study determined that "more than 75% of the participants [met] the criteria for at least one personality disorder." Andres R. Bollinger, et al., *Prevalence of Personality Disorders Among Combat Veterans with Posttraumatic Stress Disorder*, 13 J. Traumatic Stress 259, 263 (2000). "By comparison, personality disorders are estimated to occur in approximately 10-13% of the general population." *Id.* Certain personality disorders can cause a decreased ability to control anger and to conform one's behavior to societal demands for non-violent reactions to anger stimuli. Those suffering from these effects of PTSD – particularly when they are also inflicted with substance abuse disorders – are more likely than the general population to resort to violence.

The risk is particularly prevalent in those – like Cone – suffering from PTSD as a result of combat trauma. As one Army Captain explained about a fellow soldier who committed a murder after he returned home, in war, the soldier was taught to solve "very dangerous problems by using violence and the threat of violence as his main tools. He was congratulated and given awards for these actions. This builds in a person the propensity to deal with life's problems through violence and the threat of

violence." Deborah Sontag & Lizette Alvarez, *War Torn; Across America, Deadly Echoes of Foreign Battles,* N.Y. Times, Jan. 13, 2008 (quoting a letter from Capt. Benjamin D. Tiffner, a criminal defendant's former platoon leader, who was killed in Iraq in November 2007). An Army reservist and Iraq veteran who now works as a prosecutor in California similarly explained that in war "[y]ou are unleashing certain things in a human being we don't allow in civic society, and getting it all back in the box can be difficult for some people." *Id.* (quoting William C. Gentry).

This anecdotal evidence illustrates a problem of significant scope. In the mid-1980s, Vietnam veterans "made up a fifth of the nation's inmate population." Sontag & Alvarez, *War Torn*, *supra.* According to one study, fully a quarter of the male Vietnam Veterans with PTSD had engaged in 13 or more violent acts in the year directly preceding the study. *See* Hayes, 190/191 Mil. L. Rev. at 76-77. "[H]alf had been arrested or incarcerated multiple times as an adult." *Id.* Thus, the risk that military veterans suffering from PTSD will commit acts of violence is disturbingly high.

The risks of violence fall when afflicted individuals receive treatment. Unfortunately, many sufferers do not seek or receive proper care – particularly those whose PTSD is traceable to combat trauma. The National Vietnam Veterans' Readjustment Study revealed that "only a small number of these veterans" suffering from "a variety of psychological problems and experiencing a wide range of life-adjustment problems . . . actually sought

treatment from mental health providers." Price, National Center for PTSD, *Fact Sheet: Findings from the National Veterans' Readjustment Study*, *supra*. Some have attributed the lack of proper care during the Vietnam era to a dearth of a general understanding about the issues faced by PTSD-suffering veterans. Others have linked the problems to the veterans themselves: "Many Vietnam combat veterans diagnosed with PTSD view[ed] the VA hospital as an extension of the military, an institution for which they hold contempt." Reilly et al., *supra*, at 68.

Although treatment and understanding have surely improved since the Vietnam era, the problem of improper care among veterans persists. In a recent three-part series detailing the prevalence of violent crimes among those returning from the Afghanistan and Iraq Wars, the *New York Times* reported that many veterans suffering from PTSD worry that people, and particularly military colleagues, will view them as emotionally weak if they seek treatment for their disorder. Sontag & Alvarez, *War Torn*, *supra*. Few of these veterans receive the necessary care. In the *New York Times* analysis, reporters found that "[f]ew of the war veterans [now charged with a violent crime] received more than a cursory mental health screening at the end of their deployments . . . [m]any displayed symptoms of combat trauma after their return . . . but they were not evaluated for or received a diagnosis of posttraumatic stress disorder until after they were arrested for homicides." *Id.* Veterans forced to deal privately with the symptoms and

devastating effects of PTSD are ill-equipped to overcome impulses of anger and violence. As noted, many turn to drugs and alcohol to self-medicate and numb the feelings of anger and rage.

III. Evidence of PTSD and Related Substance Abuse Are Directly Relevant To Determining Whether a Defendant Formed the Requisite Intent to Commit a Crime and as Mitigating Evidence at Sentencing.

In cases where the defendant suffers from PTSD due to combat trauma, it is both reasonable and necessary for the trier of fact to consider whether the defendant's symptoms have affected his ability to manifest the specific intent required for conviction. Thus, in a trial for first degree murder, it is reasonable for the trier of fact to ask whether a defendant's PTSD-related symptoms of hyperarousal and/or psychosis, along with any evidence of substance abuse, render it unlikely that the defendant acted with the clear intent to kill the victim. Of course, the consideration of these factors does not require that a defendant escape culpability entirely. Rather, review of this evidence would merely go to whether the defendant formed a specific state of mind. If the court were convinced that his symptoms made it unlikely that the defendant formed the requisite mens rea for a specific intent crime, he might very well "still be guilty of a lesser" charge. 2 Wharton's Criminal Law § 141 (Charles Torcia ed. 15th ed., updated Sept. 2007).

Further, evidence of PTSD and related substance abuse may also be useful and necessary in the

sentencing phase of a trial. There, the trier of fact could reasonably determine that though the defendant is guilty of the crime, his disorders represent valid mitigating factors, leading to a downward departure in sentencing.

To ignore evidence of PTSD and related substance abuse in war veterans denies reality and betrays the safeguards in our criminal justice system. One military defense counsel has explained of PTSD-suffering veterans, "I think they should always receive some kind of consideration for the fact that their mind has been broken by war." Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Is Taking The Stand*, N.Y. Times, Jan. 27, 2008. A prosecutor trying a war veteran accused of a violent crime at home remarked, "I can't justify criminal activity. But it would have been unjust to [the veteran defendant] and to society to throw out the circumstances that we as a society put him in." Deborah Sontag & Lizette Alvarez, *An Iraq Veteran's Descent: a Prosecutor's Choice*, N.Y. Times, Jan. 20, 2008. Taking it upon himself to consider the direct link between the violent symptoms of PTSD and the crime at hand, this prosecutor accepted a plea from the defendant for manslaughter, rather than murder. As such, he demonstrated a reasonable response to the complex relationship between PTSD in war veterans and violent crimes.

In vivid contrast, the prosecution in this case sought to deny Cone the opportunity to make his case that one legacy of his service in Vietnam was PTSD, that this affliction had brought about a serious drug addiction, and that he had committed

the criminal acts in question in a state of psychosis that could be traced to his afflictions. It is bad enough that the prosecution refused to disclose evidence in which officers of the State repeatedly described Cone in terms that would have directly supported his defense. But it is particularly shocking that, having suppressed this evidence, the prosecution would then try to shut down Cone's defense (both at trial and at sentencing) by falsely telling the jury that there was no evidence that Cone was a drug user at all, much less that he suffered from PTSD and a long term addiction that could have left him in the psychotic state he claimed to be in when the acts of which he was accused occurred.

Thus, because Cone's ultimate substantive claim for relief under *Brady* is a powerful one, this case is an eminently appropriate vehicle for considering the threshold issues raised in the petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 28, 2008

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JOINT APPENDIX

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(b)

Supreme Court, U.S.
FILED
SEP 5 - 2008
OFFICE OF THE CLERK

No. 07-1114

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002
PETITION FOR CERTIORARI FILED FEBRUARY 25, 2008
CERTIORARI GRANTED JUNE 23, 2008

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APPENDIX A: RELEVANT DOCKET ENTRIES (EXCERPTS)

U.S. District Court

U.S. District Court for the Western District Of Tennessee (Memphis Division)

CIVIL DOCKET FOR CASE #: 2:97-CV-02312

Case Title: Gary Bradford Cone v. Ricky Bell

Date Filed: 04/14/1997

Assigned to: Jon Phipps McCalla

Cause: 28 USC 2254 Petition for Writ of Habeas Corpus—Stay of Execution

Appeals Court Case Number: No. 99-5279 Sixth Circuit

Petitioner

Gary Bradford Cone

Respondent

Ricky Bell, Warden

Entry#: Date: Description:

71 07/01/1997 PETITION for writ of habeas corpus [placed in separate folder] (ehg) (Entered: 07/02/1997)

85 09/09/1997 ORDER by Judge Jon P. McCalla ; respondent's motion to apply Title 28, Chapter 154, special habeas corpus proceedings in capital cases [76-1] is denied,; Petitioner's motion to declare Title 28, Chapter 153 inapplicable to petition for writ of habeas corpus [81-1] is granted. Any motion for reconsideration of this order must be filed by 9/11/97. (cc: all counsel) (ehg) modified on 09/10/1997 (entered: 09/10/1997)

APPENDIX B: SIXTH CIRCUIT DOCKET (EXCERPTS)

General Docket
Sixth Circuit Court of Appeals

Court of Appeals Docket #: 99-5279

Docketed: 03/04/1999

Gary Bradford Cone v. Ricky Bell

Termed: 06/19/2007

Appeal From: Western District Of Tennessee At Memphis

03/22/2001 OPINION filed: We affirm the district court's refusal to issue a writ of habeas corpus with respect to the petitioner's conviction, but reverse the district court's judgment as to the petitioner's sentence. We remand to the district court with instructions to issue a writ of habeas corpus vacating the petitioner's death sentence due to the ineffective assistance of counsel at sentencing, unless the state conducts a new penalty phase proceeding within 180 days after remand, decision for publication pursuant to local rule 206 [99-5279] . Gilbert S. Merritt, Circuit Judge, James L. Ryan, authoring Judge, Alan E. Norris, Circuit Judge.

03/01/2004 OPINION filed: the district court's decision is REVERSED as to the petitioner's sentence. We REMAND to the district court with instructions to issue a writ of habeas corpus vacating

the petitioner's death sentence due to the jury's weighing of an unconstitutionally vague aggravating factor at sentencing, unless the State conducts a new penalty phase proceeding within 180 days of remand, decision for publication pursuant to local rule 206 [99-5279]. Gilbert S. Merritt, Circuit Judge delivered a separate concurrence; James L. Ryan, Authoring Judge, and Alan E. Norris, Circuit Judge delivered a separate dissent.

06/19/2007 OPINION filed: AFFIRMED, decision for publication pursuant to local rule 206 [99-5279]. Gilbert S. Merritt, Circuit Judge delivered a separate dissenting opinion, James L. Ryan, Authoring Judge, Alan E. Norris, Circuit Judge.

09/26/2007 ORDER filed denying petition for en banc rehearing [3613460-2] filed by Mr. Paul R. Bottei. Gilbert S. Merritt, James L. Ryan, Alan E. Norris, Circuit Judges. Merritt, Circuit Judge, with whom Martin, Daughtrey, Moore, Cole, Clay, and Gilman, Circuit Judges, join, dissenting from the failure to grant en banc rehearing.

APPENDIX C: MOTION FOR THE PRODUCTION OF EXCULPATORY EVIDENCE

IN THE CRIMINAL COURT FOR THE FIFTEENTH JUDICIAL DISTRICT AT MEMPHIS

DIVISION VI

STATE OF TENNESSEE

PLAINTIFF, FILED 12-18-81

BY Pat Everett D.C.

VS.

GARY BRADFORD CONE

DEFENDANT,

NO. 74702, 74703, 74898, 74899, 74900, 74901, 74902

MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE

Comes the accused and moves the Court in the following particulars:

1. The accused moves this Court pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure to order the State of Tennessee and/or any law enforcement agencies conducting the supportive investigation for the prosecution to advise the accused, or his counsel, of the substance of any oral self-serving or exculpatory statements made by the accused. If the self-serving or exculpatory statements made by the accused are (a) in written form, (b) have been reduced to writing, or (c) have been electronically recorded and preserved, the accused moves this Court to order the State of

Tennessee and/or any law enforcement agency in possession thereof to produce same for inspection by the accused, or his counsel, and furnish the accused, his counsel, with a copy thereof.

2. The accused moves this Court to order the State of Tennessee to reveal to the accused the existence of any material variances in the statements of witnesses, accomplices, co-conspirator accessories before and after the fact, and/or principals, including statements given the investigatory agency, the prosecution testimony in another trial, or testimony before the grand jury.

3. The accused moves this Court to order the State of Tennessee to reveal to the accused the names, addresses, and telephone numbers of any witnesses known to any investigatory agencies and/or the prosecution who have misidentified any physical evidence or facts pertaining to the charges pending against the accused, or who have in fact misidentified the accused, any accomplice, co-conspirator, accessory before or after the fact, or co-principal.

4. The accused moves this Court to order the State of Tennessee to reveal to the accused the names, addresses, and telephone numbers of any witnesses who have furnished the investigator agencies and/or the prosecution with physical descriptions which do not correspond to the physical description of the accused; or who have been unable to identify the accused from photographs, line-ups, or other attempts at identifying the accused as being the perpetrator of the pending criminal charges.

5. The accused moves this Court to order the State of Tennessee to reveal to the accused the names, addresses, and telephone numbers of any

witnesses who have not given statements in written form, but who have orally indicated to the investigatory agencies and/or the prosecution what they know supports the innocence of the accused and/or is exculpatory in nature.

6. The accused moves this Court to order the State of Tennessee to give to the accused, or his counsel, copies of and the right to inspect any written statements given to the prosecution and/or any investigatory agencies which in whole or in part support the innocence of the accused and/or is exculpatory in nature when viewed in light of the guilt or innocence of the accused.

7. The accused moves this Court to order the State of Tennessee to furnish the accused, or his counsel, with any medical and/or scientific evidence consistent with the innocence of the accused and/or is exculpatory in nature.

8. If the prosecution is unable to determine whether a particular object or matter within its possession and control is exculpatory in nature, the accused moves this Court to order the prosecution to submit the data to the Court for the purpose of an in camera inspection so this Court can determine if the so submitted is exculpatory in nature.

9. The accused alleges he is in need of the material requested in this motion in advance of trial and at the earliest opportunity. Common sense indicates the information furnished the accused may very well lead the accused to additional sources of information. Thus, furnishing the accused with such information in advance of trial will permit the accused, with the effective assistance of counsel, to

investigate accumulate, evaluate and prepare the evidence for trial without unnecessary delays.

10. The accused moves this Court to make its order in this cause a continuing order, and require the prosecution to furnish the accused with such facts and information contemplated by the order which is received by the prosecution subsequent to the entering of the order.

WHEREFORE, the accused respectfully moves this Honorable Court to grant him the relief requested in the premises.

Respectfully submitted,

/s/ John C. Dice

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that I have furnished a copy of this Motion to the Office of the District Attorney General on the 17th day of December, 1981.

/s/ John C. Dice

APPENDIX D: MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION

IN THE CRIMINAL COURTS FOR THE FIFTEENTH JUDICIAL DISTRICT AT MEMPHIS

DIVISION VI

STATE OF TENNESSEE,

VS.

GARY BRADFORD CONE

DEFENDANT,

NO. 74702, 74703, 74898, 74899, 74900, 74901 74902

FILED 12-18-81

BY Pat Everett D.C.

MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION

Comes now the defendant and respectfully moves the Court for entry of an order directing the State to disclose all of the following within his custody, control, or the existence of which is known or by the exercise of due diligence could become known to the State.

I.

Any and all considerations or promises of consideration given to or made on behalf of government witnesses. By "consideration", defendant refers to absolutely anything of value or use including but not limited to immunity grants, witness fees, assistance or favorable treatment with respect to any criminal matter and anything else which could

arguably create an interest or bias in the witness in favor of the State or against the defense or act as an indictment to testify or to color testimony;

II.

Any and all prosecution, investigations, or possible prosecutions pending or which could be brought against the witness and any probationary, parole or deferred prosecution status of the witness which could be used by the State as a basis for consideration or promise of consideration to the witness.

III.

Any and all records and information revealing criminal convictions of the witness which are not obtainable from the clerk of the Criminal Court of Shelby County that the Attorney General has access to.

APPENDIX E: EXCULPATORY EVIDENCE PRODUCED BY THE DISTRICT ATTORNEY

March 29, 1982

Mr. John C. Dice

Attorney at Law

Suite 3130

100 North Main Building

Memphis, Tennessee 38103

Re: State v. Gary Bradford Cone

Dear John:

Enclosed please find two items that possibly could be of exculpatory nature. The same is being furnished to you pursuant to motions previously filed.

Also, I have some more physical evidence for you to view whenever you desire.

With kindest regards,

Very truly yours,

JOSEPH L. PATTERSON

Administrative Assistant

JLP/bd

Enclosure

7:30pm Sgt. E.G. Landrum canvassed the neighborhood, north of 121 N. Evergreen starting with 125 N. Evergreen. I talked to a female white, Martha Rast _____ 726-6694, business address of 3333 Elvis Presley Blvd. bus. ph332-1360; stated that she knew the victims well, being that they sat on their porch very often. She stated that they would either be in the garden, on the porch, or in their driveway. She last saw Mrs. Todd at 6:00 or 6:30pm on 8-11-80 sitting in the swing. She stated that the only words spoken was hello.

He talked to Laura Maoon, female white, age 30 of 126 N. Evergreen, ph722-846__, business address of 4964 Cuba Millington, home ph872-0933. Who stated that she saw both victims sitting on the porch in a swing on Sunday at approximately 5:00.

APPENDIX F: SECOND AMENDED PETITION FOR POST CONVICTION RELIEF (EXCERPTS)

IN THE CRIMINAL COURT FOR
SHELBY COUNTY, TENNESSEE
GARY BRADFORD CONE,
Petitioner,
vs.
STATE OF TENNESSEE,
Respondent.
No. P-06874
8-13-93

SECOND AMENDED PETITION FOR POST-CONVICTION RELIEF

Comes now Gary Bradford Cone, by undersigned counsel, who and pursuant to T.C.A. §40-30-101 et seq. submits to the court this Second Amended Petition for Post-Conviction Relief. In support of his petition, petitioner shows as follows:

* * *

35. The State violated petitioner's rights under Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7, 8, 9 and 16 of the Tennessee Constitution by failing to provide petitioner material exculpatory evidence including evidence concerning absence of forced entry which negated burglary, concerning contradictory statements made by eyewitnesses, and any and all information concerning State witness Ilene Blankman which demonstrated

that she received consideration for her testimony and/or testified falsely concerning facts relating to petitioner and his drug use.

APPENDIX G: STATE'S RESPONSE TO PETITIONER'S PETITION FOR POST CONVICTION RELIEF (EXCERPTS)

IN THE CRIMINAL COURT OF TENNESSEE

THIRTIETH JUDICIAL DISTRICT

AT MEMPHIS

DIVISION V

GARY BRADFORD CONE,

Petitioner

vs.

STATE OF TENNESSEE,

Respondent

NO. P-06874

SET: 8-13-93

STATE'S RESPONSE TO PETITIONER'S PETITION FOR POST-CONVICTION RELIEF AND MOTION TO DISMISS

Comes now the State of Tennessee, and in response to Petitioner's claims, would state as follows:

* * *

II.

Many of Petitioner's claims have been previously determined on appeal of the trial. As to the issue of individual voir dire cited

* * *

The issue of which petitioner complains in #35 appears to be the same as that found on page 94 of his appeal. The Court found that the State produced all of the statements which it had.

APPENDIX H: AFFIDAVIT OF GARY BRADFORD CONE (EXCERPTS)

IN THE CIRCUIT COURT FOR SHELBY COUNTY, TENNESSEE

GARY BRADFORD CONE,

PETITIONER,

v. STATE OF TENNESSEE,

RESPONDENT.

No. P-06874

AFFIDAVIT OF GARY BRADFORD CONE

COUNTY OF DAVIDSON

STATE OF TENNESSEE

Comes now the affiant, Gary Bradford Cone and affirms under oath the following which is true to the best of my knowledge, information and belief:

* * *

¶41. I did not know of the existence of this claim in earlier proceedings, including post-conviction proceedings. During those proceedings, I did not know the facts nor the legal significance of any facts concerning the State's withholding of evidence, nor did either trial or appellate or post-conviction counsel after full investigation and full disclosure discuss the significance of such matters with me and the significance or viability of this claim. Being incarcerated, indigent, and without the benefit of the record in this matter, I also had no ability to investigate or develop facts relevant to such claim.

Such facts have been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding. I have never seen those files. Had I known the facts underlying such claim, the legal significance of such facts, and the governing law, I would have presented such claim in earlier proceedings. Had I understood that I needed to raise this claim in earlier proceedings, I would have done so, had I known about this claim. I have never made a deliberate, informed, considered, tactical choice not to present this claim earlier. I have not knowingly or understandingly or intelligently or deliberately failed to present this claim in earlier proceedings.

* * *

APPENDIX I: PETITIONER'S AMENDMENT TO PETITION FOR POST CONVICTION RELIEF (EXCERPTS)

IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE

GARY BRADFORD CONE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

CASE NO. P-06874

10-15-93

PETITIONER'S AMENDMENT TO PETITION FOR POST-CONVICTION RELIEF

Comes now Petitioner Gary Bradford Cone, and pursuant to T.C.A. §40-30-101 et seq., Article I §§ 6, 7, 8, 9, 10, 11, 14, 16 and 17 of the Tennessee Constitution, the Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and respectfully amends his post-conviction petition to include the following claims enumerated below. Having recently been provided access to various pertinent documents, having again reviewed the record in this matter, and having recently performed additional investigation, counsel for petitioner has determined that there are additional grounds for reversal of petitioner's conviction and sentence. In good faith, therefore, counsel presents such additional claims as an amendment to his petition.

Because claims in the previous petition concluded at paragraph 40, Petitioner denominates these additional claims starting with paragraph 41. Petitioner also hereby incorporates into this amendment any and all statements and allegations concerning waiver presented in his "REPLY TO STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF & MOTION TO DISMISS, & STATEMENT AND AMENDMENT REGARDING ISSUE OF WAIVER" also filed this day.

ADDITIONAL CLAIMS FOR REVIEW

41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6, 7, 8, 9, 10, 11, 14, 16 and 17 of the Tennessee Constitution, because the State withheld exculpatory evidence which demonstrated that petitioner that petitioner did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past, such evidence including, but not limited to, statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins, and other persons unknown at this time, such statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollections of officers or others. Such evidence was highly exculpatory and exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted

petitioner and would not have sentenced him to death.

* * *

APPENDIX J: MEMORANDUM FINDINGS OF FACT AND CONCLUSIONS OF LAW (EXCERPTS)

THURSDAY, DECEMBER 16, 19

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT

AT MEMPHIS

DIVISION X

GARY BRADFORD CONE,

PETITIONER

VS.

STATE OF TENNESSEE,

RESPONDENT

P-06874

MEMORANDUM FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is Petitioner, Gary Bradford Cone's Second Petition for Post Conviction Relief.

* * *

The petitioner, by way of his Third Amendment, continues with grounds 41,42,43,44,45,46,47,48,49,50,51 and 52 all of which grounds are clearly re-statements of previous grounds heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition.

* * *

APPENDIX K: PETITION FOR WRIT OF HABEAS CORPUS IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

No. 97-2312-MI

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JON PHIPPS McCALLA, UNITED STATES DISTRICT COURT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION:

COMES NOW the petitioner, Gary Bradford Cone, through his undersigned counsel of record, pursuant to all applicable law, including all applicable provisions of 28 U.S.C. § 2241, et seq. (including 28 U.S.C. § 2254 as it has existed prior to its amendment in April 1996), and moves this Court to issue a writ of habeas corpus for respondent to bring petitioner before the Court to the end that he may be discharged from his unconstitutional and invalid convictions for first-degree murder, and other

convictions which have resulted in petitioner being sentenced to death and otherwise unlawfully incarcerated.

* * *

39. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the prosecution withheld exculpatory evidence, including evidence demonstrating, for example, that petitioner did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense, and which also calls into question the veracity of the prosecution's rebuttal witnesses. Such evidence was highly exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted petitioner and would not have sentenced him to death. Specifically, the prosecution withheld the following exculpatory evidence, material to both the guilt and sentencing phase of trial:

a. The District Attorney files contain various documents showing that, contrary to the prosecution's allegations at trial, Mr. Cone was a drug user and/or on drugs at the time of the offenses. Specifically, the file contains, inter alia, the following documents:

i. Law enforcement teletype system memo from Sgt. Roby dated August 10, 1980, which states

that "suspect is a heavy drug user." (D.A.'s file, document no. 852, a copy of which is attached hereto as Exhibit 5).

ii. Law enforcement teletype system memo dated August 11, 1980, authorized by Sgt. Roby which states that Gary Bradford Cone is armed and dangerous and a drug user, (D.A.'s file, document no. 850, attached hereto as Exhibit 6).

iii. Law enforcement teletype system document authorized by Sgt. Roby "to police only" dated August 11, 1980, which indicates Gary Bradford Cone is a drug user. (D.A. file, document no. 779, a copy of which is attached hereto as Exhibit 7).

iv. An incident report containing the statement of witnesses Charles and Debbie Slaughter, who stated that Mr. Cone "looked wild eyed" at the time he fled from the robbery, prior to the homicide.

v. An August 27, 1980 statement of Robert H. McKinney, who, in response to a question whether the individual who robbed the Stephenson's s Big Star on August 8, 1980 appeared "to be drunk or high on anything" responded: "Well he did, he acted real weird that is the reason I watched him," and otherwise indicated that the individual was using drugs.

vi. An August 23, 1980 statement of Sue Cone, who informed Memphis Police Sergeant Roby that Gary Cone "has a severe psychological problem" and "needed to work on his drug problem."

vii. A Pompano Beach Police Department Supplemental Police Report which described Mr.

Cone, at the time of the Florida offense, as "looking about in a frenzied manner" and "walking in his agitated manner"

viii. An August 11, 1980 Supplementary Report of Sergeant J. L. Collier, who had spoken with Chief Daniels of the Lake Village, Arkansas Police Department, who informed that Mr. Cone "was a heavy drug user."

b. The documents aforementioned were never provided by the District Attorney to the defense before trial or at any time.

c. In particular, this withheld evidence was crucial, especially given Officer Roby's rebuttal testimony. Officer Roby apparently issued the "drug user" memos contained in the District Attorney's file, but testified on rebuttal for the State that Mr. Cone did not appear to be a drug user, and he saw no indication of track marks or other indication that Mr. Cone was a drug user. Officer Roby's rebuttal testimony was directly damaging to Mr. Cone's case since Mr. Cone's essential theory was that he was suffering from amphetamine psychosis. If the defense would have been provided the above-stated documents, counsel could have impeached Officer Roby's testimony that Roby did not believe Mr. Cone to be a drug user, and would have devastated the prosecution's case.

d. Additionally, this Court has entered an order to direct the Federal Bureau of Investigation to produce all FBI records pertaining to Gary Bradford Cone and Ilene Blankman.

e. The records of the Federal Bureau of Investigation are replete with documentation that

Mr. Cone was a drug user, including but not limited to the following:

i. F.B.I. Priority Teletype dated 8/12/80 from Memphis to Anchorage, Chicago, Honolulu, Little Rock, Los Angeles, Louisville, Miami, Oklahoma City, and Philadelphia stating "Subject believed heavy drug user." (FBI's file document nos. 174-183, a copy of which is attached hereto as Exhibit 8)

ii. FBI form FD-65 dated 8/12/80 from SAC to Director of the FBI, Memphis, citing Gary Cone as "Armed and extremely dangerous; drug user." (FBI's file, document nos. 239-240, a copy of which is attached hereto as Exhibit 9).

iii. FBI Priority Teletype dated 8/14/80 from Memphis to Anchorage, Chicago, Honolulu, Little Rock, Los Angeles, Louisville, Miami, Oklahoma City, and Philadelphia stating "Armed and Dangerous. Drug User. Escape Risk." (FBI's file, document nos. 143-144, a copy of which is attached hereto as Exhibit 10).

iv. FBI Airtel dated 8/14/80 from SAC Memphis to SAC Anchorage stating "Armed and Dangerous Drug User; Escape Risk." (FBI's file, document no. 142, a copy of which is attached hereto as Exhibit 11).

v. FBI Airtel dated 8/14/80 from SAC Oklahoma City to SAC Memphis stating "Armed and Dangerous. Drug User. Escape Risk." (FBI's file, document no. 140, a copy of which is attached hereto as Exhibit 12).

vi. FBI Statistics Letter dated August 18, 1980, from SAC Memphis, to Director FBI remarking

"Armed and Dangerous; Drug User." (FBI's file, document nos. 129-130, a copy of which is attached hereto as Exhibit 13).

vii. Six photographs of Gary Bradford Cone with attachment describing Gary Cone as "Armed and Dangerous Drug User Escape Risk." (FBI's file, document nos. 257-262, 265-267, 343-344, a copy of which is attached hereto as Exhibit 14).

viii. Two teletype documents dated August 13 and 15, 1980, stating Gary Cone was "Armed & Extremely Dangerous/Drug User." (FBI's file, document nos. 164, 159, a copy of which is attached hereto as Exhibit 15).

ix. Teletype from Oklahoma City to Chicago, Little Rock and Memphis, dated August 13, 1980, stating that "While in prison, Cone was caught in possession of 850 amphetamine pills which had been supplied to him...". (FBI's file, document nos. 171-173, a copy of which is attached hereto as Exhibit 16).

x. Teletype from Little Rock to Memphis dated August 13, 1980, stating "Subject believed heavy drug user." (FBI's file, document nos. 167-170, a copy of which is attached hereto as Exhibit 17).

f. The above-referenced F.B.I. records are exculpatory, as they tend to indicate that Gary Cone, in fact, used drugs, which was denied by the State at Mr. Cone's trial. As such, these records were exculpatory. This is particularly true since an agent of the Federal Bureau of Investigation, Eugene Flynn, testified on rebuttal for the prosecution that Mr. Cone did not appear to be a user of drugs.

g. None of the above records of the Federal Bureau of Investigation were provided to counsel for the defense.

h. If counsel for the defense had the F.B.I. records in a timely manner, they could have been used to impeach Agent Flynn, discredit the prosecution's case, and further establish that Mr. Cone, in fact, was a user of drugs who was not guilty of first-degree murder.

i. Further, documents contained in both the District Attorney and F.B.I. files contain additional exculpatory evidence relating to the veracity of rebuttal witness Ilene Blankman. Those documents include:

i. A February 9, 1982 letter from prosecutor Joseph Patterson to Ilene Blankman, which confirms that he had contacted her earlier, and in which he provided her statement.

ii. A second letter, dated March 22, 1982, from prosecutor Joseph Patterson to Ilene Blankman, confirming a telephone conversation with Ms. Blankman concerning her court appearance, and once again providing her a copy of her statement to the police.

iii. An F.B.I. Report describing Ilene Blankman which demonstrates that Ms. Blankman ate dinner at a local restaurant with the prosecutors and F.B.I. agents in this case, and that, when confronted by another patron with allegations that she had testified falsely, she refused to respond.

iv. The fact that the F.B.I. had a copy of Dr. Jonathan Lipman's report in their file, demonstrating that both Ilene Blankman as well as F.B.I. Agent

Flynn, both of whom testified against Mr. Cone, had been informed about the evidence presented by the defense at trial and what they were specifically being called to rebut, thus demonstrating that such witnesses were not disinterested, truthful witnesses, but specifically collaborating with the prosecution to present facts against Mr. Cone.

v. Handwritten notes of prosecutor Joseph Patterson of a pretrial interview with Ilene Blankman, in which Ms. Blankman never stated that Mr. Cone slept in the bed with her on August 12, 1980; in which she never stated that Mr. Cone disrobed at that time; and in which she never stated that Mr. Cone had no track marks on his arms.

vi. An April 27, 1982 letter from prosecutors Joseph Patterson and Don Strother thanking Ilene Blankman for her cooperation with the prosecutors and informing that "We are sure you are happy to be able to put this behind you now." No other witness received a thank you letter from the prosecution, although the prosecutors did send thank you letters (dated the same day) to the Miami F.B.I Office (with a copy to Agent Flynn) and the Monroe County, Florida Sheriff.

j. Evidence that the money in Mr., Cone's car (which the prosecution claimed showed he was a drug dealer) was returned to the Big Star, because it was from the Big Star, and not from drugs,

k. The withholding of all of this evidence entitles petitioner to a new trial and sentencing hearing.

* * *

APPENDIX L: PETITIONER'S MOTION FOR EVIDENTIARY HEARING AND MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION EVIDENTIARY HEARING (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE

Petitioner

v.

RICKY BELL, Warden,

Respondent

No. 97-2312-M1

Judge McCalla

PETITIONER'S MOTION FOR EVIDENTIARY HEARING

To the Honorable Jon Phipps McCalla, United States District Court Judge for the Western District Of Tennessee, Western Division:

Comes now the petitioner, Gary Bradford Cone ("Cone") and respectfully requests that this Court grant an evidentiary hearing on the following claims: (1) withholding of exculpatory evidence

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE

Petitioner

v.

RICKY BELL, Warden,

Respondent

No. 97-2312-M1

Judge McCalla

Oral Argument Requested

MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION FOR EVIDENTIARY
HEARING

To The Honorable Jon Phipps McCalla, United States District Court Judge for the Western District Of Tennessee, Western Division:

Comes now the petitioner, Gary Bradford Cone ("Cone") and submits this memorandum in support of "Petitioner's Motion for Evidentiary Hearing."

I. Introduction

Mr. Cone filed his petition for writ of habeas corpus on July 1, 1997, raising numerous constitutional errors in his trial for capital murder. He requests an evidentiary hearing on the following issues raised in his petition for Writ of Habeas Corpus:

* * *

Paragraph #	Description of Claims
39 (a) - (k)	Brady v. Maryland Claims

* * *

IV. Mr. Cone is Entitled to an Evidentiary Hearing on the Following Enumerated Claims

A. Brady v. Maryland Claims

When the prosecution fails to disclose exculpatory evidence to a criminal defendant, the defendant is entitled to a new trial "where the evidence is material to either guilt or punishment Brady v. Maryland 373 U.S. 83, 87 (1963). As a matter of due process, the prosecution is obliged to disclose to the defense all available material exculpatory evidence: "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting, on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 436-438 (1995).

On March 26, 1997 petitioner moved this court for a subpoena to obtain the District Attorney's files; which was granted by this court. The Court also allowed production of relevant F.B.I. files. Upon a review of these files, numerous documents were discovered which were exculpatory in nature; and which were not provided to the Defense. These exculpatory documents included the following:

Numerous documents apparently generated by Memphis Police Sgt. Ralph Roby that

indicated Gary Cone was a heavy drug user. (See petition, Exhibits 5-7.)

Numerous exculpatory documents purportedly generated by the FBI which indicated that Gary Cone had used drugs at the time of the offense. (See Petition, Exhibits 8-17)

Other exculpatory documents demonstrating that witnesses who testified at trial provided authorities information consistent with Mr. Cone's drug usage, and documents calling into question the truth of Ilene Blankman.

As discussed in the petition, these documents are highly exculpatory. Mr. Cone's defense at trial focused upon lack of criminal culpability due to "Amphetamine Psychosis" arising out of Cone's drug use. The prosecution asserted in its rebuttal proof that Mr. Cone was not a drug user, but a drug seller. In support, Sergeant Roby testified in rebuttal for the state that he saw no evidence that Gary Cone had injected drugs in his body. Had the defense been provided documents generated by Sergeant Roby indicating that Mr. Cone was a drug user, Sgt. Roby could have been effectively cross-examined with respect to this testimony that Mr. Cone was not a drug user. Likewise, the remaining documents would have shown that Mr. Cone was a drug user, and that the testimony to the contrary was not accurate. Thus, exculpatory and material evidence was withheld by the prosecution giving rise to a Brady violation.

1. Proof That Would Likely Be Offered At An Evidentiary Hearing on Brady Claims.

The following proof would likely be offered at an evidentiary hearing on the Brady issues would include the following proof:

a. Ms. Sandra Truit, Custodian of Records for the District Attorney's Office, to testify concerning the existence and maintenance of the District Attorney records.

b. Mr. Don Strother & Mr. Joseph Patterson (District Attorneys General) Both would be called to testify that all of the exculpatory documents attached as Exhibits 5-17 to the petition were not provided to defense counsel.

c. Sergeant Ralph Roby. Officer Roby would be called to testify, for example, about his knowledge of Mr. Cone's drug usage, and for the purpose of eliciting cross-examination testimony that defense counsel could have obtained if the exculpatory documents had properly been provided to defense counsel.

d. Charles and Debbie Slaughter, who testified at trial, would be called to testify concerning their pre-trial statements to authorities describing Mr. Cone as being "wild eyed" at the time he fled the robbery.

e. Robert H. McKinney would be called to testify consistent with his statement of August 8, 1980 that Cone acted "real weird" and appeared to be on drugs in the days before the Broadnax robbery and the killings

f. April Ferguson, counsel for Gary Cone, would testify concerning defense counsel's access to the withheld exculpatory documents.

g. Jim Kopernak, state post conviction counsel for Cone, would also testify concerning his lack of possession of the F.B.I. and District Attorney documents

h. Custodian of Records, FBI, would be called concerning the existence and maintenance of the exculpatory FBI records.

i. Eugene Flynn, FBI agent who testified in rebuttal for the state that Mr. Cone was not a drug user, would be called in light of the withheld F.B.I. records.

j. Sergeant J.L. Collier, who spoke with Chief Daniels of the Lake Village Arkansas Police Department, who informed that Mr. Cone was a heavy drug user

k. Chief Daniels of the Lake Village, Arkansas Police Department, to testify about Mr. Cone's heavy drug usage

l. All authorities who actually created the exculpatory F.B.I., District Attorney General, and Pompano Beach documents, including those who prepared and/or sent out teletype messages concerning Mr. Cone's heavy drug usage

m. All witnesses, mentioned below concerning the false argument claim concerning the source of the money found in Mr. Cone's car as being from the Big Star Robbery. See infra.

2. Mr. Cone is Entitled To A Hearing On the Brady v. Maryland Issues.

Mr. Cone has never received a hearing on the merits in state court with respect to the Brady claims and thus is entitled to a evidentiary hearing on such claims pursuant to 28 U.S.C. §2254(d)(1), (3), (6), and

Townsend v. Sain, supra. Additionally, petitioner cannot be said to be at fault for failing to raise the Brady claims earlier, since petitioner was not entitled to discover the District Attorney's files under state law while Cone's state post conviction petition was proceeding. In fact, it was not until the Tennessee Appellate Court's decision in Capital Case Resource Center v. Woodall, 1992 WL 12217 (Tenn. App. 1992), that District Attorney files were discoverable. Thus, Mr. Cone could not have raised these Brady claims at the state court proceedings. See also discussion of procedural default supra, and in the Reply. In any event, this Court also has the discretion to a hold a hearing on these claims.

* * *

APPENDIX M: ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE,

Petitioner

v.

RICKY BELL, Warden, Riverbend
Maximum Security Institution,

Respondent.

Case No. 97-2312-M1
Judge McCalla

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

JOHN KNOX WALKUP
Attorney General & Reporter
JOHN H. BAKER III
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Criminal Justice Division
425 Fifth Avenue North
Nashville, TN 37243-0493
(615)741-3487

* * *

Petitioner was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because the prosecution withheld exculpatory evidence. (Amended Petition for Writ of Habeas Corpus, at 12-17, ¶ 39).

Petitioner has procedurally defaulted this claim. It was first raised in his second post-conviction proceeding. The Court of Criminal Appeals of Tennessee, the last state court to review the petition, held that petitioner had waived "all claims raised in his second petition for post-conviction relief which had not been previously determined." Consequently, petitioner has failed to comply with an adequate and independent state procedural rule and is now barred from raising the claim in a federal habeas corpus proceedings. Additionally, a review of the merits of the claim clearly demonstrates that petitioner is not entitled to relief.

In order to make out a successful Brady claim, petitioner must establish (1) that the prosecutor suppressed evidence; (2) that such evidence was favorable to the defense; and, (3) that the suppressed evidence was material. The prosecution's failure to disclose potentially exculpatory information does not violate Brady "'where a defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory information" or where evidence is available to the defendant from another source.'"

APPENDIX N: BRIEF OF RESPONDENT-APPELLEE IN THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (EXCERPTS)

No. 99-5279

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE

Petitioner-Appellant

v.

STATE OF TENNESSEE

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

PROOF BRIEF OF THE RESPONDENT-APPELLEE

MICHAEL E. MOORE
Solicitor General
State of Tennessee
TONYA MINER
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
Nashville, TN 37243
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B.P.R. No. 19690

* * *

A. Brady Claims Barred by Procedural Default

It is an elementary rule of habeas corpus law that only constitutional claims first presented to state courts are subject to federal habeas corpus review. See Granberry v. Greer, 481 U.S. 129 (1987); Rose v. Lundy, 455 U.S. 509 (1982); Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. Absent "cause" and "prejudice" or "actual innocence," all claims not fully presented to the state courts are barred from review in a subsequent habeas corpus proceeding. Schlup v. Delo, 513 U.S. 298, 324-25 (1995); McLeskey v. Zant, 499 U.S. 467, 494-95(1991); Coleman v. Thompson, 501 U.S. 722, 750 (1991); Teague v. Lane, 489 U.S. 288, 297-98 (1989); Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977). That is exactly the situation presented in the first issue of Cone's brief. Cone's Brady claims were simply never raised in the state court. Only a conclusory attempt was made by Cone to raise the allegations in his second post-conviction petition and not the specific claims as now alleged.[7]

[7] In his June 22, 1989 *pro se* petition at paragraph 20 (d), Cone alleges, "The State failed to disclose evidence to which the accused was entitled at either the guilt or penalty phase of the trial." In his second amended petition filed August 10th 1993 at paragraph 35, he alleges, "The State violated petitioner's rights under Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Secs 7,8,9, and 16 of the Tennessee Constitution by failing to provide petitioner material exculpatory evidence concerning the absence of forced entry which negated burglary, concerning contradictory statements made by eyewitnesses, and any and all information concerning state witness Ilene Blankman which demonstrated that she received consideration for her testimony

and/or testified falsely concerning facts relating to petitioner and his drug use." (R.4: Notice of Filing Documents, Addendum 3, Doct 1, Apx. pg.___)

* * *

APPENDIX O: SECOND SUPPLEMENTAL BRIEF OF THE RESPONDENT IN THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (EXCERPTS)

No. 99-5279

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE

Petitioner-Appellant

v.

RICKY BELL, WARDEN

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

SECOND SUPPLEMENTAL BRIEF OF THE RESPONDENT

MICHAEL E. MOORE

Solicitor General

State of Tennessee

JENNIFER L. SMITH

Associate Deputy Attorney General

Office of the Attorney General

P.O. Box 20207

Nashville, Tennessee 37202

(615) 741-3487

B.P.R. No. 16514

* * *

Finally, as this court observed in its initial decision, as to the four groups of documents Cone claimed were withheld by state prosecutors — (1) evidence regarding drug use; (2) evidence that might have been used to impeach Officer Ralph Roby; (3) FBI reports; and (4) evidence showing that the prosecution's witness, Ilene Blankman, was untruthful and biased — Cone never alleged to this court any justifiable cause for his failure to raise the first, second, and fourth claims in a timely manner in the state court. And as to the third category, he made no argument that he was prejudiced as a result of the government's alleged failure to disclose the documents. Cone, 243 F.3d at 971.

* * *

APPENDIX P: RESPONSE TO PETITION FOR REHEARING IN THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (EXCERPTS)

No. 99-5279

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE,

Petitioner-Appellee,

V.

RICKY BELL, WARDEN,

Respondent-Appellant.

RESPONSE TO PETITION FOR REHEARING

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* * *

A. Cone's Brady claims were never fairly presented to the state courts.

Although the foregoing discussion demonstrates that the Court's alternative merits determination ultimately renders immaterial any questions concerning the panel's default determination, respondent will address the default question briefly in response to the Court's July 25, 2007, order. In respondent's principal brief in this Court, the State took the position, consistent with the district court's conclusion, that, with the exception of one factual predicate (related to the origin of money found in Cone's car), Cone's Brady claims were barred by procedural default. (Final Brief of Respondent, p. 12) Specifically, the State argued that the "specific claims as now alleged" were never raised in state court. (Id., p. 13) (emphasis supplied) In a footnote, the State quoted the generalized allegations contained in Cone's June 1989 pro se post-conviction petition at paragraph 20(d) and in his August 1993 second amended petition at paragraph 35.[6] (Id.) In addition, the record shows that Cone

---

[6] In the August 1993 amendment, Cone alleged generally that the State failed to provide material exculpatory evidence "including evidence concerning contradictory statements made by eyewitnesses, and any and all information concerning State witness Ilene Blankman which demonstrated that she received consideration for her testimony and/or testified falsely concerning the facts relating to petitioner and his drug use." [Apx. Pg. 1971].

asserted in ¶41 of an October 1993 third amended petition the following:

> 41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments ...because the State withheld exculpatory evidence which demonstrated that petitioner did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past, such evidence including, but not limited to, statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins, and other persons unknown at this time, such statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollections of the officers or others.

[Apx. Pg. 2006][7] Even with these multiple pleading opportunities and admitted access to the District Attorney's files, Cone never articulated to the state courts the specific claims asserted in this federal proceeding.

* * *

---

[7] Although the State's Brief did not cite the allegations of ¶41 of the October 1993 amendment, the panel was certainly aware of all the amendments, since each was reproduced in the Joint Appendix, and the October amendment was quoted and/or referenced in Cone's briefs. See Final Brief of Appellant, p. 17 n. 16; Reply Brief of Gary Cone, p.1. The attorney who authored the State's principal brief resigned from the State Attorney General's Office in 2000.

APPENDIX Q: MOTION TO EXPAND THE RECORD, STATEMENT OF MR. ROBERT H. MCKINNEY (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE

Petitioner

v.

RICKY BELL, Warden,

Respondent

No. 97-2312-M-1:

Judge McCalla

MOTION TO EXPAND THE RECORD/
ALTERNATIVELY
MOTION TO ALLOW PARTIAL OFFER OF PROOF

Statement of: Mr. Robert H. McKinney, MB, 48, home address of 2621 Lajena, home # 948-5710. Employed at Stepherson's Big Star at 4770 Poplar, business phone # 683-3361. This statement is made on August 27, 1980, at 10:00a.m. at 4770 Poplar to Sgt. R.L. Roby.

Q: Robert where you present on August 8, 1980, during the robbery?

A: Yes I was.

Q: Did you see the party responsible for the robbery?

A: Yes I did.

* * *

Q: The person you saw responsible for the robbery, did he appear to be drunk or high on anything?

A: Well he did, he acted real weird that is the reason I watched him.

Q: Okay, tell me how he acted weird?

A: Well he just wandered around the store, this was before the robbery, he just kinda went to the back and I was at the back and he came around up front and I came around up front. Some distance from him, kinda of observing him.

* * *

APPENDIX R: MOTION TO EXPAND THE RECORD, INCIDENT REPORT OF CHARLES AND DEBBIE SLAUGHTER (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE

Petitioner

v.

RICKY BELL, Warden,

Respondent

No. 97-2312-M-1:

Judge McCalla

MOTION TO EXPAND THE RECORD/
ALTERNATIVELY
MOTION TO ALLOW PARTIAL OFFER OF PROOF

Offense/Incident report.

Narrative (cont)

Toward the alley, just a few minutes before I came up. They described MW as about 30, 5'7" to 5'8", stocky build, about 180 lbs. had brown collar length hair, neat looking, a full brown beard with a gray white in the center of his chin. He was wearing gold wire rim glasses with clear lens and was wearing green cut off arm pants, no shirt and was carrying dark color plaid shirt in his right hand. They said that he looked wild eyed and might not have been wearing shoes. The Slaughters lives at 143

Auburndale, phone 726-9112. I talked to them a second time approx. 1415

Approx. 1450 I went to 143 N. Evergreen where the dispatcher received information earlier regarding a MW fitting this description trying to take resident's car at gun point. Herschel said that about 1:30 p.m. he was _____ his car from the rear of 143 N. Evergreen when the MW ran to his, from the southwest corner of the house and yelled at him to wait a minute. Herschel said he stopped and the MW ran up to the car door and told him "I want your car". Herschel said he saw the pistol and the MW told him to move it. Herschel said he told him he wasn't going to do it and shut off the car and took the keys out and got out. Herschel said the MW pointed the pistol at him, and told him to give him the keys and Herschel said no. Herschel said that he was backing away from the MW and the MW told him to give his keys or he would shoot him. Herschel said that he ran out the driveway from the MW and hear the pistol click three times. Herschel said he went to the front of the house and looked back and the MW ran south. Herschel said that he didn't think this MW had a beard, but wasn't sure. He said that MW did have a northern type accent. He did said that he thought he could recognize him. Sgt. Wilson, Car 1122, made the scene and the car was also _____.

Shooting team

_____ 8/9/80 1647

* * *

APPENDIX S: MOTION TO CORRECT OR MODIFY THE RECORD, POMPANO BEACH POLICE DEPARTMENT INCIDENT REPORT

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

GARY BRADFORD CONE

Petitioner

v.

RICKY BELL, Warden

Respondent

No. 97-2312-MI

Judge McCalla

MOTION TO CORRECT OR MODIFY RECORD

PAGE NBR 1 Offense Robbery Location Zone Shift 3 Case Number 026341

On Wednesday, August 13, 1980, the undersigned was riding as a passenger in unit 282, with Det. Flynn the operator. Officers were driving south on Federal Highway from the 5400 block. Officers received a BOLO in regards to an armed robbery that had occurred at Sears Fashion Square, Pompano Beach.

Officers continued south on Federal and were further advised via radio for the possible whereabouts and description of the perpetrator.

As the officers approached 2300 N. Federal a description was given of a W/M with a brown two piece suit, brown hair and carrying a brown satchel.

Shortly after the receiving this broadcast, officers observe a W/M fitting this description was observed at the rear of Sambos Restaurant. Subject was observed to be looking about in a frenzied manner and also appeared to be looking for a place to run.

Officers approached the subject while in their vehicle and the subject was still walking in his agitated manner behind Sambos.

Officers pulled directly in front of the subject. The subject was observed to be wearing the clothing described and matched the physical description given by radio.

The undersigned and Det. Flynn started exiting the vehicle they were in. The subject was observed carrying the brown satchel over his back, carrying it with his left hand and his right hand was being held down at his side. The undersigned drew his weapon and started to exit the vehicle and had his firearm discharge through the windshield of the unit. The subject looked in the direction of the undersigned and then proceeded to flee past the front of Sambos. Both officers then proceeded to chase the subject yelling for him to "HALT", "Police Officers," several times. The subject was observed to throw the brown satchel on the ground and head east through Sambos parking lot. As both officers turned around the corner of the building yelling for him to stop the subject turned and fired from a handgun at the undersigned. The undersigned fired at the subject.

The subject then turned and started running east again for about ten yards. He then turned facing west, pointed in the direction of Det. Flynn and fired his handgun. Both officers fired back.

The subject then proceeded east again and ran around the south side of the building at NE 22 Ct. and 25 Avenue.

The undersigned went to the north side in an attempt to cut off the subject's escape route. The undersigned observed officer Flynn run around the south side of the building and officer Egan arrive

APPENDIX T: HABEAS PETITION IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, TELETYPE SGT R.L. ROBY (EXCERPTS)

LETS

"LAW ENFORCEMENT TELETYPE SYSTEM"

DATE	8-10-80
AUTHORIZED BY	SGT R.L. Roby
BUREAU	Violent Crime

MESSAGE NUMBER

OPERATOR

TIME

SEND TO: State of Oklahoma Attn State Police

Wanted by Memphis Police Department, Violent Crimes Bureau, for investigation armed robbery, and assault to murder of a police officer:

Gary Bradford Cone, M/W, 31, DOE 10/11/48; SSN: 429-82-5268

P.O. Box 42, Lake Village, Arkansas

7", 160 lbs, blue eyes, dark brown, stringy, shoulder length hair, full beard.

Suspect is heavy drug user, armed and dangerous. Approach with caution. Suspect may possibly be wounded.

Have in our possession, large quantity of narcotics and money, confiscated from suspect's car. These narcotics are possibly from hospital pharmacy. If your department has any record of Burglaries or hold-ups of hospital pharmacy. Please contact my office at 528-2275.

Cone supposedly sentenced to 25 years for armed robbery- current status your state unknown. Request any data you may have on suggest.

LETS

"Law Enforcement Teletype System"

DATE August 11, 1980

AUTHORIZED BY Sgt. R.L. Roby

BUREAU Violent Crimes

MESSAGE NUMBER

OPERATOR

TIME

Send to: Nationwide broadcast, special attention, Oklahoma Bureau of Prisoners, Lake Village

Arkansas Police Department, State Police Fayetteville Arkansas, Chicago Illinois Police Dept. County Police of KAUAI, Hawaii, and Key West Florida Police Department.

WANTED: GARY BRADFORD CONE, MW, DOB, 10/11/48, 5/7, 160 lbs, SS#429-82-5268, 3 to 4 week beard, ARMED AND EXTREMELY DANGEROUS, DRUG USER

CHARGE: Robbery with a deadly weapon (TCA-39/3901) 2 counts, assault to murder (shot police officer to avoid arrest), assault to murder on citizen, aggravated assault (2 counts warrant #S4553. We will extradite.

Suspect robbed a local jewelry store of large amount of jewelry. Got in 1972 Olds Cutlass Arkansas license #HS502 and fled the scene. Within

minutes vehicle spotted by police and chased. Male white abandoned vehicle and shot a policeman, then fled on foot. Shot and critically wounded a citizen and attempted to shoot another citizen to obtain vehicle. Suspect not apprehended. Vehicle contained all jewelry taken in the robbery and large amount of clothing and personal items as if male white living in vehicle or taveling.

Vehicle VIN 3G87H2Z125135.

LETS

"Law Enforcement Teletype System"

DATE August 11, 1980

AUTHORIZED BY Sgt. R.L. Roby

BUREAU Violent Crimes

MESSAGE NUMBER 8-065-VC

OPERATOR

TIME

SEND TO: Nationwide broadcast, Special Attention, Oklahoma Bureau of Prisoners, Lake Village Arkansas Police Department, State Police Fayetteville Arkansas, Chicago Illinois Police Dept. County Police of Kauai, Hawaii, and Key West Florida Police Department.

WANTED: GARY BRADFORD CONE, MW, DOB, 10/11/48, 5'7 160 lbs, SS#429-82-5268, 3 to 4 week beard, ARMED AND EXTREMELY DANGEROUS, DRUG USER.

CHARGE: Robbery with a deadly weapon (TCA-39/3901) 2 counts, assault to murder (shot police officer to avoid arrest), assault to murder on citizen, aggravated assault (2 counts warrant #S4553. We will extradite.

Suspect robbed a local Jewelry Store of large amount of jewelry. Got in 1972 Olds Cutlass Arkansas license #HS502 and fled the scene. Within minutes vehicle spotted by police and chased. Male white abandoned vehicle and shot a policeman, then fled on foot. Shot and critically wounded a citizen and attempted to shoot another citizen to obtain vehicle. Suspect not apprehended. Vehicle contained all jewelry taken in the robbery and large amount of clothing and personal items as if male white living in vehicle or taveling.

Vehicle VIN 3G87H2Z125135

CITY OF MEMPHIS

INTER-OFFICE

MEMORANDUM

To: Dispatcher Date: 8-15-80

From: Sgt. R.L. Ruby V/C Subject: Gary Bradford

cone m/w DOB 10/11/48

Please cancel Nationwide Broadcast on cone. In custody, Pompano Fla.

APPENDIX U: MOTION TO CORRECT OR MODIFY THE RECORD, SUE CONE INTERVIEW (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent

No. 97-2312-MI

Judge McCalla

MOTION TO CORRECT OR MODIFY RECORD

(Sue Cone) Yeah and she's not doing well at all, please try not to bother her.

(Sgt. Roby) All I'm doing, the reason we were calling you, not for information on what happened, but maybe if the family could just give some light on as to why, maybe some background on Gary, because he's, like we're not asking for any information about the crime, but if there is any psychological problems we're not aware of.

(Sue Cone) Well there's severe psychological problems, I had someone to go see him yesterday

(Roby) A doctor.

(Sue Cone) I had a friend who is an attorney. A doctor is going to see him Monday or Tuesday.

(Roby) At Briarwood County Jail.

(Sue Cone) Yes, and he's to work on that and he needs to work on the drugs.

(Roby) What about Gary's drug problem.

(Sue Cone) You know, I just wasn't aware just how severe it was, but I do now.

(Roby) Of course you may have read it in the paper that there was a large amount of drugs found in the car as a matter of fact.

(Sue Cone) I haven't read any of the papers here as a matter of fact, you're the first person whose contacted me.

(Roby) Well one of the reasons I called there is a loose end, one being I don't know if you are aware of it, you wrote the check yourself. He had a check form you for $500.00.

(Sue Cone) I was lending him money to go to law school. And he told me about that right.

(Roby) I didn't know if he stole the check from you or what, what I was going to let you know is that we do have the check and it's not cashed. It's not going to be cashed, but you might be aware that we do have it.

(Sue Cone) Oh no, he told me that on a telephone call, he said by the way I guess I won't be using your check, because I was going to lend him $500.00 a month for school.

(Roby) When have you talked to him last. We saw him one day last week.

(Sue Cone) I just talked to him today as a matter of fact.

(Roby) He called you.

(Sue Cone) Yeah

(Roby) Can you call him.

(Sue Cone) No.

APPENDIX V: HABEAS PETITION IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, FBI TELETYPES (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent

No. 97-2312-MI

Judge McCalla

Transmit Via: Precedence: Classification:

x Teletype x Priority x UNCLAS EFTO

Date: 8/12/80

FM Memphis (88-10893) (P)

To Anchorage priority VIA FBIHQ 2138Z

Chicago Priority 0107Z

Honolulu Priority VIA FBIHQ 2138Z

Little Rock Priority: 2228Z

Los Angeles Priority 0228Z

Louisville Priority 2323Z

Miami Priority 2255Z

Oklahoma City Priority 01040Z

Philadelphia Priority 0325Z

WFO Priority 0205Z

BT

UNCLAS E F T O

Gary Bradford Cone; UFAP- Robbery with a deadly weapon. 00: ME.

For information of receiving offices, on Aug. 9, 1980, subject entered the Brodnax Jewelry store located at 3482 Plaza, Memphis, Tenn., with a pistol and robbed store of jewelry

* * *

Subject believed heavy drug user. Armed and extremely dangerous, shot and wounded police officer following robbery. BT

(FBI file, document nos. 174-183)

Transmit Via: Precedence: Classification:

x Teletype x Priority x UNCLAS EFTO

Date: 8/14/80

FM: Memphis

* * *

(Page 2)

Pomparro Beach, Florida Police Department after shotout with police. Subject stole an auto and robbed a drug store which resulted in subsequent chase shootout and apprehension.

Miami at Pomparro Beach, Florida:

Will continue investigation to gather evidence in Memphis robbery, shooting of MPD officer and unsolved homicide of S.O. and Cleopatra Todd at 121 North Evergreen.

Armed and dangerous. Drug user. Escape Risk. BT

(FBI file, document no.144)

Transmit Via: Precedence: Classification:

x Airtel x Priority x UNCLAS EFTO

Date: 8/14/80

TO: SAC, Anchorage

FROM: SAC, Memphis (88-10893) (P)

SUBJECT: GARY BRADFORD CONE, aka – FUGITIVE (A) UFAP-ROBBERY WITH A DEADLY WEAPON

OO: MEMPHIS

Re Memphis teletype to Anchorage, dated 8/12/80.

Enclosed for each receiving office is one photo showing two pictures of subject except three photos are enclosed for the Little Rock Division.

ARMED AND DANGEROUS DRUG USER; ESCAPE RISK

2 – Anchorage (Enc. 1)

2 – Chicago (Enc. 1)

2 – Honolulu (Enc. 1)

2 – Little Rock (Enc. 3)

2 – Los Angeles (Enc. 1)

2 – Louisville (Enc. 1)

2 – Miami (Enc. 1)

2 – Oklahoma City (Enc. 1)

2 – Philadelphia (Enc. 1)

2 – WFO (Enc. 1)

2 – Memphis

DHJ:sj_____(22)

88-10893-14 (FBI file, Document no. 142)

TO: SAC, MEMPHIS (88-10893)

FROM: SAC, OKLAHOMA CITY (88-12353) RUC

RE: GARY BRADFORD CONE; FUG. (A) UFAP-ROBBERY WITH A DEADLY WEAPON; 00:ME

Re ME tel 8/14/80.

On 8/13/80, ALICE JANE SCHMIDT PELLEY, Oklahoma City, Okla., was interviewed by FBI and advised she is employed as a parts person at Johnson & Johnson Restaurant Equipment Co., 106 NE 24th, Oklahoma City.

PELLEY advised she met GARY BRADFORD CONE in 1978 at Oklahoma State Prison, Strington, Okla., while visiting her husband, who is also serving time. PELLEY advised that her husband is JERRY PELLEY and he has served 4 years, 3 months for armed robbery in the Spring of 1974. PELLEY advised that her husband is due for parole this year.

PELLEY advised her husband and subject CONE were incarcerated together and were friends. She stated the last time she hear from CONE was last July, 1980 when he called from Chicago to tell PELLEY that he had been accepted at the law school of the University of Arkansas and that he was thrilled about it. PELLEY said CONE was going to Arkansas in August but she has not heard from him since. PELLEY appeared cooperative and advised she would notify the FBI should CONE contact her.

ARMED AND DANGEROUS. DRUG USER. ESCAPE RISK.

FBI file, document no. 140

From: SAC Oklahoma City

TO: SAC Chicago, Little Rock, and Memphis

8/13/80

* * *

FBI Teletype Page Two. UNCLAS

While at McAlister State Prison, Cone escaped in 1973, stealing an automobile for which he received another 3 year term. Parole was originally set for first offense December 5, 1975, but because of escape was finally paroled in November 29, 1979. While in prison Cone was caught in possession of 850 amphetamine pills.

* * *

FBI file, document no. 172

FROM: SAC Little Rock

TO: SAC Memphis

FBI Teletype File Page Four 8/13/80

Address of 454 North Gregg does not exist. Subject resided from January 1, 1972, until May 4, 1972 at 545 North Gregg Apartment E.

Fayetteville PD has established neighborhood sources and will alert should subject return to apartment.

Investigation continues.

Subject believed heavy drug user. Armed and extremely dangerous. Shot and wounded police officer following robbery.

FBI file, document no. 170

APPENDIX W: HABEAS PETITION IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, FBI STATISTICS LETTER

STATISTICS LETTER

TO: DIRECTOR, FBI

FROM: SAC, MEMPHIS (P)

SUBJECT: GARY BRADFORD CONE, aka _____ - ROBBERY WITH A DEADLY WEAPON

OO: ME

REMARKS:

Subject charged with robbery of the Brodnax Jewelry Store, 3482 Plaza, Memphis, Tenn., which occurred on 8/9/80. Subject shot a Memphis Police Department (MPD) officer and a civilian during a chase following the robbery. On 8/12/80, AUSA Rebecca Wilson, WDT, Memphis, authorized a complaint charging subject with violation T18, U.S. Code, Section 1073. On 8/12/80, complaint filed before U.S. Magistrate Aaron C. Brown, Jr. and warrant issued.

ARMED AND DANGEROUS; DRUG USER

2 – Bureau

2 – Memphis (1-88-10893) (1 – Stats in Process)

88-10893-19

FD-65 (Rev. 2-9-78)

Federal Bureau of Investigation

AIRTEL

To: Director, FBI
Att: Criminal Investigative Division
Fugitive Unit

Date: 8/12/80

From: SAC MEMPHIS (P)

INSTRUCTIONS - Reverse side
NOTE: Priority "A" and "B" Fugitives - With initial submission, set forth a synopsis of crime on reverse side.

Subject: GARY BRADFORD CONE - FUGITIVE
UFAP - ROBBERY WITH A DEADLY WEAPON
(OO: Memphis)

☒ Initial Submission
☐ Supplements FD-65 dated _____

FUGITIVE INDEX

Indicate Fugitive Priority
☐ A
☐ B
☐ C

CR. PR-MN-761-E-(1)-80

Caution: B	MKE	Name: Gary Bradford Cone			NAM	Sex: M	SEX Race: W RAC
Place of Birth: Lake Village, Arkansas	POB	Birth Date: 10/11/48	DOB	Height: 5'7"	HGT	Weight: 160	WGT
Eye Color: BLU	EYE	Hair Color: BRN	HAI	FBI No.: 896-780 Jr	FBI	Skin Tone	SKN
Scars, Marks, Tattoos, etc.							SMT
NCIC Fingerprint Classification	FPC	Other Identifying Number		MNU	Social Security #: 429-82-5268		SOC
Operator's License Number	OLN	Operator's License State		OLS	Year Expire		OLY
Offense Charged OFF: UNLAWFUL FLIGHT TO AVOID PROSECUTION							
U. S. Code, Title and Section: T18, Section 1073							
Warrant Issued By: U.S. Magistrate Aaron C. Brown, Jr. 8/12/80				DOW	F. B. I. File # 89-10893		OCA
Date FBV or Bond Default Case Referred to Office:							
Miscellaneous Including Bond Recommended: ARMED AND EXTREMELY DANGEROUS; DRUG USER. $100,000 secured bond				MIS	Fingerprint Classification (Henry System)		

LICENSE PLATE AND VEHICLE INFORMATION

License Plate Number	LIC	State		LIS	Year Expires		LIY	License Plate Type			LIT
Vehicle Identification #	VIN	Year	VYR	Make	VMA	Model 78	VMO	Style 2	VST	Color	VCO
Aliases				Additional Identifiers: AUG 15 1980							
NCIC #: W237820028			NIC								

60 SEP 15 1980

FBIHQ (1) - Fugitive Unit
1 - Memphis
DHJ:cjs
(3)

SUBJ

527

600259

BEST AVAILABLE COPY

APPENDIX Y: HABEAS PETITION IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, NCIC TELETYPE FBI FILE

ENTERED NCIC

D. Johnson

88-10893-S

000020

546

APPENDIX Z: MOTION TO CORRECT OR MODIFY THE RECORD, PATTERSON'S PRETRIAL NOTES ON ILENE BLANKMAN

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

GARY BRADFORD CONE

Petitioner

v.

RICKY BELL, Warden,

Respondent

No. 97-2312-MI

Judge McCalla

MOTION TO CORRECT OR MODIFY RECORD

Notes on Ilene Blankman 294-6232

-knew Cone

-met him at Bull & Whistle about six months prior

-I liked to talk with him—discussed music—school

--He had 2 sisters – (one in Hawaii)

--He was from Arkansas

--He never mentioned the service as I remember

-

Saw Cone approx. a total of 8 or 10 times for several hours at a time

Cone was in Key West

--never used drugs around me

--never saw Cone with drug paraphernalia

--Cone studied quiet a bit

--my statement is true and correct

--on 8/12/80—Cone over tired –not upset –not nervous

--called to see procedure for Dr. Lic.

--needed voter registration

--He had a Dr. Lic manual

APPENDIX AA: MOTION TO CORRECT OR MODIFY THE RECORD, FBI REPORT DESCRIBING ILENE BLANKMAN

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 5/3/82

On April 21, 1982, trial proceedings pertaining to the trial of Gary Bradford Cone terminated at 9:00 PM in Judge James Beasley's court, Fifth Division, Shelby County Court, Memphis, Tennessee. At approximately 9:45 PM Attorney General's Office Attorneys Joseph Patterson and Don Strother, along with Ilene Blankman and Special Agents Eugene J. Flynn and Robert W. Kelly, were at the Maggo's Downtown Restaurant, Memphis, Tennessee. A white female identifying herself only as Gloria introduced herself along with another lady by the name of Bobby, last name unknown (LNU), to Assistant Attorney Generals Don Strother and Joseph L. Patterson. She advised that she knew Assistant Attorney General Don Strother and that she insisted in knowing the identity of Joseph Patterson. Joseph Patterson she thought was the Attorney General of Shelby County, Hugh W. Stanton. Upon introduction she advised that she knew these attorneys were prosecuting Gary Bradford Cone and that she was a personal friend of the Chief Defense Counsel, John Dice. She wanted to know information about the trial. She verbally criticized Ilene Blankman calling her a "turncoat" and saying that "you're trying to burn him" meaning Gary Bradford Cone. She stated that she observed SA Flynn on a prior occasion and knew him to be a witness in the trial. She also stated she observed SA Flynn while he had breakfast at David and Arthur's

Restaurant during this week and during the trial. Ilene Blankman made no response to her accusations and all parties involved refused to discuss the trial explaining that it was not proper. She stated that she had discussed the trial with John Dice and the motive and the defense pertaining to the Vietnam syndrome. She knew and

MM 88-16699

helped John Dice on the case and other Vietnam veteran problems and cases. She further stated she was in love with Mr. Dice and had a high regard for his morals, integrity and efforts and was more than willing to help him. She stated she would see John Dice the following morning and discuss the trial and discuss her meetings with the above mentioned individuals which she stated was a conspiracy to defame Gary Bradford Cone and to undermine the efforts of John Dice. She stated that she held everyone in disregard and was very suspicious regarding the prosecutors and all state testimony. She frequently tried to get conversation going regarding the trial and the prosecutors, Agents and Ilene Blankman refused to discuss the trial with her. It was explained to her that the opinion of all individuals present was that they all had a high regard for defense attorney John Dice and agreed with her that his morals and integrity are outstanding and that he is doing an excellent job in the defense of Gary Bradford Cone.

APPENDIX BB: MOTION TO CORRECT OR MODIFY THE RECORD, PROSECUTION LETTERS TO ILENE BLANKMAN

February 9, 1982

Ms. Ilene Blackman

Post Office Box 1841

Key West, Florida 33040

Dear Ms. Blackman:

Enclosed herewith please find a copy of your statement, which you requested. We would appreciate your acknowledging receipt of this statement. Your cooperation in this particular matter is appreciated.

With kindest regards,

Very truly yours,

JOSEPH L. PATTERSON

Administrative Assistant

JLP/bd

March 22, 1982

Ms. Ilene Blankman
811 Truman, Apartment 3
Post Office Box 1841
Key West, Florida 33040

Re: State of Tennessee
v. Gary Bradford Cone

Dear Ms. Blankman:

This will confirm our telephone conversation of today concerning your Court appearance in Division VI of the Criminal Courts of Shelby County, Tennessee.

Enclosed herewith please find a copy of your 9-page statement, heretofore given to the Memphis Police Department. Also enclosed please find a subpoena for your appearance in Division VI on April 12, 1982. As I explained to you, do not appear in Division VI on April 12, 1982, but wait until we call you and advise you the exact date to be here. I will contact Special Agent Bob Kelly in order that you and Agent Kelly may coordinate your appearance in Memphis.

If you have any questions concerning this particular matter, please do not hesitate to contact Don Strother or myself.

With kindest regards,

Very truly yours,
JOSEPH L. PATTERSON
Administrative Assistant

JLP/bd

April 27, 1982

Ms. Ilene Blankman

Post Office Box 1841

Key West, Florida 33040

Dear Ilene:

We certainly appreciate your cooperation with us in the trial of Gary Bradford Cone and just wanted you to know that the jury returned the death penalty in both Murder cases and gave him the maximum on all the other charges. We are sure you are happy to be able to put this behind you now.

Best wishes in the future,

Very truly yours,

JOSEPH L. PATTERSON

Administrative Assistant

Don D. Strother

Assistant District Attorney General

DDS:seb

APPENDIX CC: TRANSCRIPT OF EVIDENCE, MATTHEW JAREMKO (EXCERPTS)

Transcript of Evidence, Matthew Jaremko, Tr. 1662-1676

* * *

VOIR DIRE EXAMINATION BY MR. DICE

Q. If you will, sir, state your name for the Court.

A. Matthew Emmett Jaremko.

Q. Mr. Jaremko, I'm going to ask you whether you have a professional title of Doctor.

A. Yes.

Q. All right. And I would ask you, sir, where you reside.

A. Oxford, Mississippi.

Q. Okay. And may I ask you, sir, are you employed?

A. Yes.

Q. And by whom and where?

A. University of Mississippi, in Oxford.

Q. Okay. What do you do for them, please, sir?

A. I'm a professor in the clinical psychology training program. –

Q. Okay.

A. – I direct the Center for Psychological Services in the Psychology Department, which is a training clinic there

Q. Okay. In fact, are you in the business of training other psychologists?

A. Yes, sir.

Q. All right. And how long have you held that position, Dr. Jaremko? (Page 1662)

A. Two years.

Q. I would ask you whether or not you hold any degrees, Dr. Jaremko?

A. I have a bachelor's degree, a master's degree, and a Ph.D.

Q. What was your major in your bachelor degree, please.

A. Philosophy and Psychology.

Q. Okay. And from where did you graduate and when?

A. North Texas State University in 1967 – 1971, I'm sorry.

Q. All right. And when did you receive your master's degree, please, sir?

A. 1972, from the same institution.

Q. And what was your major in your master's degree?

A. Clinical Psychology.

Q. And I would ask you, sir, whether or not, you have a Ph.D. from North Texas State University?

A. That's correct.

Q. And when did you obtain that, please, sir?

A. 1976.

Q. And what was your major at the time you obtained your doctorate, Dr. Jaremko?

A. Clinical Psychology.

Q. Okay. I would ask you, if you will, to state to the Court your continuing education that you've had in the (Page 1663) field of psychology?

A. You mean in the form of seminars, or –?

Q. Yes, sir. The training that you've had. Have you served an internship?

A. Oh, yes, I interned at the Medical University of South Carolina, in 1975, '76.

Q. I pass you this document, Doctor. Is that what we might call a vitae, or resume, of your experience as a clinical psychologist?

A. Yes, it is.

Q. Would you explain to the ladies and gentlemen of the jury where else you've had training and education, please, sir.

A. Well, I've had several seminar training at various facilities around the country on special topics: learning disabled children, hypnosis, clinical research, bio-feedback.

Q. Are you a member of any professional organizations?

A. Yes, I'm a member of the American Psychological Association, the Association for the Advancement of Behavior Therapy, the Association of

Behavior Analysis, the Southeast Psychological Association, the Eastern Psychological Association.

Q. Alright. Are you published, Doctor?

A. Yes. (Page 1664)

Q. All right. Would you read to the jury, please, the publications that you have been involved in.

A. Do you want me to read all of them?

Q. Yes, sir, absolutely.

A. Well, I've written two books; one on personality, one on stress prevention in management. I've published 25 articles on stress and anxiety related disorders. (Page 1665)

* * *

Q. All right. May I have that back, Doctor?

A. (Witness complies)

Q. Dr. Jaremko, beside your employment with the University of Mississippi, I would ask you whether or not you are employed in the City of Memphis, Tennessee?

A. I'm a consultant to the Memphis Vet Center. (Page 1666)

Q. Okay. And by the "Memphis Vet Center," what are we speaking of, please, sir?

A. The Memphis Vet Center is an out-reach facility, in downtown Memphis, which offers services – treatment services and diagnostic services for veterans of the Vietnam War who are having adjustment difficulties, stress problems.

Q. Okay. And I would ask you, sir, in your duties at the Vet Center, do you know the young man who is seated behind me – and I'm going to put my hand on his shoulder. Do you know this person?

A. Yes, I do.

Q. And his name is Gary Cone.

A. Yes.

Q. Is he, in fact, your patient?

A. Yes.

Q. All right. And I'd ask you, Dr. Jaremko, have you talked with, interviewed Mr. Cone, as your patient?

A. Yes, I've seen him twice for approximately six hours, and have had contact with him through letters.

Q. Okay. And I would ask you this, Dr. Jaremko. When you say that you treat Vietnam veterans, what exactly do you treat them for?

MR. STROTHER: I object, your Honor. It's irrelevant what he treats other Vietnam Veterans for. (Page 1667)

THE COURT: Yes, I think we might limit it to this area here. Unless it goes to his field of expertise.

MR. DICE: Yes, Your Honor, I think it does.

THE COURT: Well, possibly, we'll see. We'll let him answer.

A. Treat them for stress and anger problems. Many of these men have a problem – a disorder called post-traumatic stress disorder, which is a result of their exposure to combat and situations following the Vietnam War, and many of them have

developed stress-related symptoms, including anger, depression, emotional distancing, employment difficulties, drug related problems. We try to treat them by teaching them better ways to cope with the stress of being maladjusted to society.

Q. All right. I'd ask you specifically, does post-traumatic stress syndrome, as you've described it, have a common name of "Vietnam Veterans Syndrome"?

A. It's been termed that, yes.

Q. All right. I'd ask you whether or not it is a recognized mind disease in a book called the DSM III?

A. Yes, it is.

Q. All right. And so that the jury might understand what "DSM III" is, what is that, Doctor?

A. It is a manual that contains a list of mental disorders that is used by psychiatric and psychological professionals to diagnose individuals with adjustment problems; psychiatric and psychological problems (Page 1668)

Q. Okay. In general, have you testified as a clinical psychologist, as an expert witness, in courts other than in the State of Tennessee?

A. Yes.

Q. And in which states are that?

A. Virginia.

Q. All right. And I would ask you specifically, have you testified as an expert in Vietnam Veterans Stress Syndrome, or Post-traumatic Stress Syndrome in Shelby County?

A. Yes.

Q. And was that in Division 5 of the Criminal Courts of Shelby County?

A. Yes.

MR. DICE: If Your Honor please, I'd tender Dr Jaremko as an expert in clinical psychology, and as an expert in the disease known as 'Vietnam Veterans Stress Syndrome" or "Post-Traumatic Stress syndrome".

THE COURT: General?

MR. PATTERSON: We pass the witness to the Court.

THE COURT: All right, he may testify as an expert. (end of page, Page 1669)

DIRECT EXAMINATION BY MR. DICE

Q. All right. Dr. Jaremko, I would ask you if you have performed a patient history on your patient, my client, Gary Conc?

A. Yes.

Q. All right. And so that I might ask you this, have you made a diagnosis of Mr. Conc in your examination of him?

A. Yes.

Q. And what are those diseases, and what are the basis for your findings?

A. It is my opinion that Mr. Cone has a combination of two disorders: One is a substance abuse disorder, but that is superimposed upon a post-traumatic stress disorder. The substance abuse disorder – I'll get to in a minute, but I believe that

the post-traumatic stress disorder is the major cause for why he got involved in drugs. This post-traumatic stress disorder is a result of him being exposed to the trauma of combat and the continuing trauma that occurred after he came back as a Vietnam veteran from an unpopular war, in which he became disenfranchised from the (page 1670) society at large, causing him a great deal of personal stress, social maladjustment.

The four features of a post-traumatic stress disorder that Mr. Cone has manifested over the years has been, of course, the exposure to the trauma of combat; but, secondly, the reliving of the combat trauma. Mr. Cone manifests for some time, nightmares that are related to Vietnam – his being in Vietnam. He manifests what are called "flashbacks," that is, thinking about – perceiving himself being back in combat situation. The third category of this disorder is an emotional distance and a social distance from society at large, in which has a large change in his value system – what he perceives as being important. After suffering from the exposure to the combat trauma he apparently has changed from perceiving things like work and success and discipline as being important dimensions in his life to other kinds of values. He considers now things like kindness, pleasure, justice, truth, to be more important than achievement-oriented values. In other words, he's distant from – he's at odds with the traditional values that most of us are socialized by, because of his exposure to the Vietnam combat situation.

Then the fourth category of this disorder is stress related symptoms, whether they be depression,

nervousness, sleep disorders – he has manifested all of these problems. (Page 1671)

Now, I believe that he then started to use drugs sometime during his tenure in Vietnam, and has continued to use drugs as a self-way to self-medicate against the stress that he feels from having been a victim of the combat trauma. So, in summary, it's my opinion that he has a combination of a substance abuse disorder that is a result of self-medication from the stress related disorder he incurred when he was in Vietnam.

Q. Why do you say that the substance abuse disorder is an outgrowth of his service in Vietnam, Dr. Jaremko?

A. There is no evidence, from my interview, or other's interviews of Mr. Cone, that he used drugs before he went to Vietnam.

Q. Okay. When you use the term "values vacuum" to the jury, what are we discussing in terms of values vacuum as it relates to a Vietnam veteran as opposed to, say, a World War II veteran?

A. The Vietnam veteran was exposed to a war that was unpopular, that was, in effect, lost, and he was traumatized by laying his life on the line for what turned out to be nothing; whereas people – And that made him question the legitimacy of his patriotic values. Whereas combatants from other wars, I think, were heralded as people who upheld the values of the society in general. Given the fact that Mr. Cone participated in Vietnam and was, in fact, if we can (page 1672) say, used, for no real purpose – that's anybody's able to determine – then that's caused him to question traditional values.

Q. Okay. Is the drug abuse syndrome – the substance abuse syndrome that you have seen in Mr. Cone, is it something that you have treated him and many other veterans for?

A. I have not treated Mr. Cone; I've diagnosed him.

Q. All right. Well, is it a diagnosis that is prevalent among Vietnam veterans?

A. Yes, it is.

Q. Of the veterans at the Memphis Veterans Center that you treat, Doctor, roughly what percentage of them have this problem?

MR. STROTHER: Objection, Your Honor.

THE COURT: Sustained.

Q. All right. To your knowledge, was Mr. cone, when he – He returned from Vietnam in 1969, is that correct, Doctor?

A. Yes.

Q. All right. Are you saying that this Vietnam veterans syndrome which got as a result of his service in combat continues, and, if so why?

A. For lack of treatment.

Q. Specifically, what do you mean by that statement? (Page 1673)

A. He's never been treated for it.

Q. Okay. –

A. For either the substance abuse disorder or the post-traumatic stress disorder.

Q. All right. Now, I would ask you, Dr. Jaremko, whether or not you and myself and Dr.

Jonathan Lipman have discussed your patient, and my client, Mr. Cone. Together, have we not?

A. Yes, we have.

Q. All right. Do you have a medical opinion as to whether or not your patient was suffering from a mental illness in August of 1980, which you –

MR. PATTERSON: I object. He said "medical opinion", that's something – He's not a medical doctor.

MR. DICE: Well, I'll rephrase it, Your Honor.

Q. Do you have an opinion as a clinical psychologist as to whether or not your patient, and my client, was suffering from a mental illness in August of 1980.

A. Yes, I do.

Q. And what is your opinion in that regard?

A. Yes, he was. My opinion is that he was.

Q. All right. And would that illness that he was suffering from render him substantially incapable of conforming his conduct to the requirements of the law? (Page 1674)

A. I believe it would.

Q. All right. And I would ask you whether or not that illness is such to prevent his knowing the wrongfulness of his conduct?

A. I can't say about that.

Q. All right. I would ask you, Dr. Jaremko, whether or not Mr. Cone has expressed to you any remorse for his involvement in the killings of a couple known as Cleopatra and Shipley Todd?

A. Yes, he has. He's said that he was very sorry that that happened.

Q. All right. Now, is it your statement as a clinical psychologist, based on a reasonable degree of either psychological certainty or psychiatric certainty, that he is suffering from a mental disease or defect?

A. It is my opinion, yes.

Q. All right. And I would ask you, Dr. Jaremko, whether or not, in your opinion, the diseases that he's suffering are based – both on post-traumatic stress syndrome, as you've characterized it, and on his substance abuse disorder?

A. I didn't understand that question.

Q. Is it your opinion based both upon his suffering from post-traumatic stress syndrome and substance abuse disorder?

A. Yes.

Q. All right. And is the substance abuse disorder (Page 1675) superimposed on the post-traumatic stress syndrome?

A. I think that the substance abuse disorder is caused by – or was caused by the post-traumatic stress disorder, yes.

Q. Okay. And is another name – is the substance abuse disorder – is that a recognized mental illness recognized by clinical psychologists and psychiatrists?

A. Yes, it is.

Q. All right. And I would ask you, Dr. Jaremko, whether or not when you interviewed my

client, Gary Cone, was that done with me? Was I present at the time?

A. Some of the time I spent with him you were present; some of the time, you were not present.

Q. All right, sire.

May I have just one moment, your Honor?

THE COURT: Yes, sir.

(Defense conference with Defendant)

Q. You say that Mr. Cone has never, to your knowledge, ever been treated for suffering under post-traumatic syndrome. Is that correct?

A. To the best of my knowledge, and according to his report, yes –

Q. Okay.

A. – No, he has not. (Page 1676)

APPENDIX DD: TRANSCRIPT OF EVIDENCE, JONATHAN J. LIPMAN (EXCERPTS)

Jonathan J. Lipman, Ph.D., called as a witness by the Defendant, after first having been duly sworn was examined and testified as follows:

* * *

Voir Dire Examination By Mr. Dice:

Q. If you will, please, sir, will you state your name.

A. Jonathan Joseph Lipman.

Q. And Dr. Lipman, can you tell me where you live?

A. Here in Memphis, Tennessee.

Q. And I'd ask you whether or not you have a professional title, such as lawyer, doctor, what-have-you.

A. I'm a neuropharmocologist, sir.

Q. All right. I would ask you, Doctor, whether or not you hold the title of "doctor," because of a doctorate degree that has been conferred upon you?

A. Yes, sir.

Q. Did you bring with you what you and I might call a vitae, or resume?

A. I did not, sir, no.

Q. I pass you this, and ask whether you can identify it.

A. (after examining document) This is a copy of my curriculum vitae, or resume, up to March of 1981, which –

Q. I would ask you, Doctor, if you will, will you state (Page 1715) to the jury your educational background, please, sir.

A. My initial professional education began at – this is all largely in England – at the Kitson College of Science, where I studied for the advance certificates of education and psychology, biology, and chemistry I went there to do my professional degree at the Hatfield Polytechnic in Biochemistry and Pharmacology; doing my residence at the Institute of Neurology in Queen Square, London. And, thereafter, went to the Welsh School of Pharmacy, where I taught, and did my doctorate in neuropharmacology.

Q. What was your thesis, Doctor?

A. The substance of my thesis was an examination of the mechanisms of action of painkilling and addictive drugs, and the reduction of unpleasant effects that occur as a result of taking them.

Q. Are you a member of any professional associations?

A. Yes, sir. I'm a graduate and a member of the Royal Institute of Biology, which is my principal professional association; and a member of the American Society for Neuroscience. I'm also a member of the International Narcotics Research Congress, and other neuroscience based societies.

Q. Have you ever served or been a member as a consultant to universities?

A. Yes, sir. (Page 1716)

Q. Okay. And would you state your educational background in that regard, please, sir.

A. Commencing in Wales at the Welsh School of Pharmacy as a consultant, I was engaged in consultation work with the Welsh National School of Medicine Drug Dependence Unites and Clinics, with regard –

Q. What do you mean by drug dependence units and clinics?

A. Persons who are taking drugs to the point where they can not stop taking drugs, and who present themselves for medical treatment, in England, are entitled to treatment or abstinence, their choice. And it's the purpose of the clinic to supervise their continuation or their abstinence. My particular concern was that I was looking at ways of relieving these symptoms of abstinence, by which I mean the discontinuation of the drug. And –

Q. As such, were you an expert in the effect of drugs on the human body?

A. Oh, certainly.

Q. All right. I would ask you to continue with your professional education, Doctor.

A. Moving on from the Welsh School of Pharmacy, when I came to Memphis I joined the Faculty Medical Practice Corporation Pain Clinic, a clinic here established for the control of intractable pain – pain which cannot be (Page 1717) treated, only controlled, drugs being a major component of that treatment. I moved thence to the Department of Anesthesiology with a joint appoint in Biochemistry at the University of Tennessee. The purpose of this appointment being to determine what biochemical

nature of pain concerning the biochemicals in the brain which the chronic pain patient has, and how that changes with pain relief.

Q. Are you now engaged as a consultant privately as a neuropharmacologist?

A. Yes, sir.

Q. If you will, explain to the jury what a neuropharmacologist is, please, sir.

A. The nerves which our brain is made up of communicate to each other by means of chemicals. There is a gap between each nerve. And for a message to jump from one nerve to another, the chemical has to be released. It goes from one nerve to the next nerve where it strikes a receptor site on the nerve.

This is how the brain works. There are a number of different chemicals in the brain. Drugs which act on the brain, act largely by replacing or interfering with those chemicals which the nerves used to communicate with each other.

A neuropharmacologist studies the action of drugs on the brain. And in so doing he also – and some (Page 1718) neuropharmacologists consider that this is their main aim – he also understands how the brain works chemically. This is a brief synopsis of what a neuropharmacologist is.

Q. Are you published, Doctor?

A. Oh, yes, sir. (Page 1719)

* * *

Q. Dr. Lipman, I'd ask you whether or not you have testified in the courts of this state as an

expert witness on the effects of drugs on the human body and mind?

A. Yes, sir.

Q. And you have done so in the State of Mississippi?

A. Yes, sir.

MR. DICE: I tender Dr. Lipman as an expert witness, if Your Honor please, and ask that he be allowed to state his opinions as to the effects which the witness has testified to.

THE COURT: Any questions?

MR. STROTHER: No questions within the limits stated by Mr. Dice, Your Honor.

THE COURT: All right. He may testify as an expert witness in the field of neuropharmacology. (Page 1721)

* * *

Direct Examination by Mr. Dice

A. Now the significance of this, really, in December of 1979, is that these are ferociously large doses taken by – Imagine, fifteen tablets, you're only supposed to take one – and that by mouth, and he's making them up into solution and then he's injecting them, with the consequent immediate effect. But for a person to be taking this amount of drug, which incidentally, comes to between 300 and 450 milligrams a day – Conservatively, let's call it 300 milligram of amphetamine, and 650 milligram a day of Demerol. What is astonishing about this pattern is that the man is sleeping between midnight and 6

a.m. He shouldn't be sleeping. And the explanation for this lies in the way that he's using Demerol. You see, Demorol is somnambulant, (Page 1736) it makes you sleepy, and it reduces – As Mr. Dice said and – I almost agreed with him, it's kind of a downer. It reduces the anxiety producing effects of amphetamine. So that what you see at this time is a pattern of drug use in ferocious proportions. He has to be tolerant. I could not survive one of these amphetamine doses. He must be tolerant to it. And he is having to repeat it. If the amphetamine – Well, one of those injections and I wouldn't sleep for days. You also have what is known as a reasonably normal pattern of living. A cyclidian rhythm is reasonably normal. It almost implies that he is using the drug to function normally. And I think I would rest it on that.

He's clearly tolerant because he's taking such large doses to function. And he's clearly tolerant because he's sleeping. The normal amphetamine user, who uses amphetamine alone, doesn't sleep for days. He continuously repeats the amphetamine dose. As soon as the effect wears off, he injects another. There is a self-limiting factor in this; and that is that the more that you take, the more that you start to suffer from something called "acute amphetamine psychosis."

Q. Doctor, what do you mean by the word "psychosis"?

A. Psychosis is different from amphetamine psychosis, but I can explain them both. One of my lecturers once explained (Page 1737) to me in layman's terms, is that a neurotic builds castles in the sky, and a psychotic lives in them. His world is

not the real world, and his value judgments are very, very different.

* * *

Now, amphetamine produces a psychotic reaction, and it's specifically called amphetamine psychosis because it's not a genuine endogenous psychosis which you develop yourself. It's a drug induced toxicity state (Page 1738)

* * *

They alleviate the unpleasant symptoms of coming off this enormous high, but they do not alleviate the acute paranoia. Paranoia is fear. And eventually, the fear becomes all predominating, and voluntarily the speed freak – as it's called – terminates his run, and sleeps for days.

Now, that's the acute amphetamine psychosis, and when someone is admitted in that condition to an emergency room, it's very often difficult to distinguish it from a psychiatric condition known as paranoid psychosis. Even biochemically, it's very similar. Drugs which are anti-psychotic – and which we give to people who have schizophrenia – will terminate this unpleasant reaction from taking amphetamine. In fact, it's biochemically based in the brain the same way.

When I'm talking about chronic amphetamine psychosis I'm not actually talking about that particular phenomenon. This type of pattern is a chronic amphetamine psychosis, or is commensurate with a person having a chronic amphetamine psychosis due to the doses that he's taking. I wasn't

there and I don't know, but these are very large doses. A chronic amphetamine psychosis results from taking amphetamine over a very long time. (Page 1742)

* * *

Chronic amphetamine psychosis results from taking it for a long time, and that depends very much on the individual as to what a long time is.

In the case of Gary Cone, he had been taking it since he was eighteen, in 1966. When I went to 1979, he's graduated through the injection route, and he's now taking larger doses. And in order to alleviate the effects of the paranoia that the amphetamine is taking hold of him, he injects an opiate – something that is common, something that is placid, something that will take away that anxiety and that feeling of persecution. And that's why he takes, according to his description, the Demerol dose twenty minutes later. He needs the amphetamine to sustain normal alertness function, but it produces the unpleasant effects of the chronic amphetamine psychosis. And he relieves himself of those symptoms by taking what is essentially a tranquilizing drug, an opiate. And what we have here, in December 1979, is a very unusual situation. Because he is taking the Demerol – which is tranquilizing, therefore he is able to overcome the paranoid symptoms of the amphetamine, enabling him to take another dose of amphetamine, which causes a paranoid symptom which he alleviates with Demerol. It's a co-dependence upon and between the two drugs. Now, it's not totally unusual for an amphetamine user to use a depressant like this. They usually use barbiturates. (Page 1743)

* * *

By April of 1980 – using the same visual analogue scale, when Mr. Cone was trying to represent to me what a typical sort of day would be like. Previously, he had taken ten – fifteen, usually fifteen Desoxyn, yellow 15 milligram tablets, and solubilized them in water and injected it as four injections. By April of 1980, he was taking that solution and using it in two injections. His tolerance had gone to the level where he required twice as much to get out of bed in the morning. This was large, but this is rather horrific. It's not unheard of. And certainly I've heard of higher doses being used by speed freaks. But this is a chronic state, this is not a one-week binge. This is between December '79 and April, 1980.

In April 1980, his drug pattern had changed completely and so had the cycle of his life. This is one day. And he's not sleeping anymore. What's happening is that he injects this double dose of 112 milligram to get out of bed. He then injects – not 1 cc, but 3 or 4 or more cc's, at a time, twenty minutes after he gets up to take away the feelings of the paranoia that the amphetamine (Page 1745)

* * *

This is beginning to look more like the typical speed run of the acute short user, but it isn't a short user, it's somebody that's been taking documented doses since December of '79 through to April of 1980. And he's no longer using these for normal functioning. This was normal functioning. In a sense,

he's using the drugs to keep going. Not necessarily to keep a normal, healthy routine...He describes his symptoms as being in clear consciousness. Not clouded. And that isn't unusual in the amphetamine chronic psychosis. In fact, it's diagnostic. A setting of clear consciousness.

From this point on, his drug use continues to – this is what we call "binge" in street language. It's analogous to the alcohol binge of the alcoholic, where he just takes too much at one time and keeps going and keeps going. And several of these binges occurred in (Pause) Excuse me. Incidentally, that comes to 1650 milligram of Demerol a day, and amphetamine is now to the order of 300 – call it 300, conservatively 300.

In June of 1980, he went to Hawaii. And continuing (Page 1747) this kind of pattern, he consumed by intravenous injection two-thirds of an ounce of Cocaine. A cocaine binge. He described, during that time, symptoms of extreme paranoia. Fear.

Q. What symptoms did he describe, Doctor?

A. Well, he described the – what we call the "formication hallucinosis." Formica is likened to the ant. And in the formication hallucinosis, you feel as though you have ants crawling under your skin. It's unpleasant. He also described one incident on a deserted beach in Hawaii where he was injecting his Cocaine. Cocaine, incidentally, is very much like amphetamine. It has a very similar effect, but it's much shorter lasting and therefore you can build up larger doses. The rush lasts brief seconds and – the Cocaine has been broken down immediately. In amphetamine, the rush lasts brief minutes, and is

then broken down slowly. He was taking Cocaine, as well. Two-thirds of an ounce in ten days is rather a lot.

In addition to the formication hallucinosis he described that he was on a deserted beach injecting his Cocaine, and he had his gun in his hand. There's no one around, and he knows that there is no one around. And he knew – as he describes it to me – that his paranoia was (Page 1748) meaningless, it was silly . . . This is one of the things that distinguishes that kind of psychosis from the amphetamine psychosis; in that the amphetamine psychosis usually knows that his paranoia is ridiculous, or at least is misplaced . . .

Q. All right. At this time, in your diagnosis of your patient, is he addicted or dependent or what?

A. He's addicted, dependent, and suffering tactile hallucinations. He is dependent, because if he stops he will go through these terrible symptoms of both amphetamine withdrawal, and plus he taking opiates as well. He goes (Page 1749) through amphetamine withdrawal. These doses are, frankly, just – I'm talking about the weight. I didn't see him at the time, but when you take this weight of drug – When you're taking 1650 milligram of Demerol a day in the vein, and 300 milligram of amphetamine in doses as large as 112 milligram each, and you're taking Cocaine, you're both tolerant and dependent just on the weight of the drug that you're ingesting. Strictly speaking, one would have to observe the withdrawal sign. But it isn't possible to take – in my opinion – to take doses as large as this, for as long as this, without becoming dependent .

* * *

Q. Doctor, I'd ask you, if you will, to go forward with your patient history of Mr. Cone from April of 1980, down to August – the 9th and 10th, 1980, the dates of the crimes involved in this case.

A. Well, the continuing pattern of Demerol and methamphetamine injection escalated in the manner that I've just described. It was interspersed with numerous oral amphetamine tablets, which – for the purpose of the amount, estimating the amount, it's very difficult. He didn't know on a day to day basis. But he said, "popping them (Page 1750) every two hours for forty-eight hours – no sleeping." And he was interspersing them with 18 cc. of Demerol of a 5% solution, which apparently he'd stolen from a drugstore. In that two days when he's taking 1800 milligram of methamphetamine, and 900 milligram of Demerol – Notice the Demerol use goes down. He's tending towards amphetamine use at this point, which is why I characterize it as a classical speed binge. – He did not sleep . . . And he also described the background vague suspiciousness, growing in intensity . . . This fear, with insight, is again quite typical. . . (Page 1752)

* * *

By August 1980, he was suffering severe symptoms of – I still have to call it formication hallucinosis, the feeling of something under the skin. But at this point he's losing touch and trying to do something about it. Again, this is also typical of the amphetamine psychosis symptom . . . the fact that he imagined them as being pieces of plastic really shows that his symptoms were becoming quite profound. He

said that he couldn't explain his thinking processes that week before the robbery. With that amount of drug, I don't really expect him to.

Q. Would chronic amphetamine psychosis be such as to prevent his knowing the wrongfulness of an act?

A. Yes.

Q. Would it be such as to render him substantially incapable of conforming his conduct to the requirements of law that he's charged of violating in this case?

A. Uh-huh, yes.

Q. Would it be such that he would be suffering, in fact, from a mental illness – albeit drug-induced – at the time of the commission of the crime?

A. It is a mental illness, yes. (Page 1758)

* * *

Q. All right. I'd ask you what the effect of someone who is suffering from chronic amphetamine psychosis is in terms of withdrawal.

A. Chronic amphetamine psychosis alone, the withdrawal – First of all, the withdrawal from the drug produces a symptom of muscle fatigue. Produces a traumatic depression. Crying isn't unusual. It produces largely psychic symptoms, and overlaid upon this is the ongoing amphetamine induced paranoia – which does not go away for several weeks. (Page 1762)

* * *

Cross Examination by Mr. Strother

Q. Did you attempt to verify anything that he told you?

A. Yes.

Q. You did?

A. I was trying to explain. That was the reason why I held two interviews nine weeks apart. And during those hours of the second interview, with all due respect to Mr. Cone, I suggested to him that he had told me certain symptoms: hallucinations of the auditory nature, for instance, which are very common in amphetamine psychosis, and I had suggested to him on the second interview that he had previously told me that was what he'd experienced. I knew that he hadn't. I wanted to see if he would jump at (Page 1779) the chance of adding another symptom to the list. And he just denied it. He said that he never experienced any auditory hallucinations. I believe he was telling the truth, as he knows it.

Q. You believe he was telling the truth?

A. Well, it's my opinion.

Q. Did you ever do anything to verify that he was issued – as he told you, amphetamines by the Army, if I understand your testimony correctly.

A. I determined that the official – I'm going to answer this in two questions, if I may. I determined that the official stance of the Army is that they don't do that; and therefore, it was impossible. And I also determined through – I

believe, Dr. Jaremko, that it is terribly, terribly common for the Army to do that.

Q. So the only basis you have for that is what Dr. Jaremko told you. Is that right?

A. No, no, other veterans also. I only mentioned him because I believe you know him.

In other words, it's not official policy, but it happens widely.

Q. It happens widely?

A. So I am informed. (Page 1780)

* * *

Q. You have never looked at or contacted the state of Florida to see if there are records down there or any blood tests that were done, or anything else? Is that correct?

A. That's right. I didn't know about this. I think it – I was rather surprised. It speaks somewhat for itself. He told me he was using drugs, and he told me what sort of drugs. Frightening large amounts for a long time. (Page 1782)

APPENDIX EE: TRANSCRIPT OF EVIDENCE, JOSEPH PATTERSON AND DON STROTHER (EXCERPTS)

Closing Argument of Prosecution

Mr. Patterson: May it please the Court, and ladies and gentlemen of the jury. As His Honor, Judge Beasley, said a moment ago, this is what we call – or they refer to as argument. I refer to it, myself, as more or less of a let's review what you heard. Because that's why you're here to sit as a jury – and I wish that wouldn't echo back on me and I can stand back just a little ways. (Page 1991)

* * *

I believe the proof is that he got out of prison in November of 1979 from his own witnesses in his behalf, and the proof shows that he was back in custody on August 13, 1980. Now here's a fellow that is able to go to Hawaii, (Page 2014) and apparently not work – as I call it work. I'm talking about getting up every morning and putting on your clothes and going to some job where you are productive. Has a passport. Why would he need a passport. I don't need a passport to come to work. Goes to Key West, Florida. Has an automobile that – I've got a '73 automobile. He does he do all this? I'm not trying to be absurd, but he says he's a drug addict. I say balony. He's a drug seller. Doesn't the proof show that? (Page 2015)

* * *

Mr. Patterson: Thank you. The facts are that he made a phone call to a Sue Cone in Chicago, Illinois, at 3:24 p.m. on August 10, 1980. According to the passport, Sue Cone, who lived in Chicago, is the Defendant's sister. I submit to you that you can infer that he called his sister. There is a fact that Sue Cone did not testify in this lawsuit.

But I submit to you he was as sane as it was hot that day that he killed Mr. and Mrs. Todd. Look to the facts of the case, and not to some theory in reaching that decision. Look to the cold hard facts. That's all I ask. I don't ask you to speculate.

But I submit to you when you were listening to Doctor – what's his name, the pharmacologist – couldn't even write a prescription. They bring him in here as an expert and submit to you – Excuse the expression, "That dog don't hunt." Look to the facts of what Mr. Cone did on Saturday and Sunday to go to his mental attitude. He wasn't (Page 2023) drug crazy. He is a robber and a killer. Simple as that. Nothing complicated about this.

He robbed Brodnax. He knew what he was doing when he did it. He tried to avoid the police. And he did a pretty good job of it. Got all the way to Key West, Florida, within a period of forty-eight hours. Doesn't that show a pretty good mental process?

Then you have this pharmacologist who sees him a year and a half later, and he says: why, this fellow is drug crazy. What did the people say that were near him at the time? They didn't see any

indications of anything like that. That's their theory. I'm not asking you to rely upon theories.

Look at the cold, hard facts, and you will find this. And I'll shut up in just a minute, and I'm sure you're going to say, well, I'm glad he did that.

But we have proved beyond a reasonable doubt and to a moral certainty that on the day in question, that is of August 9, 1980, that Gary Bradford Cone robbed Aaron Hayes who is an employee of Brodnax by the use of a deadly weapon. The range of punishment in that particular case upon proof beyond a reasonable doubt, and I submit the State has carried the burden of proof, is from ten years to life. If you want a suggestion as to punishment on that particular matter, I submit under the facts and (Page 2024) circumstances of the total body of the proof – And that's what you should – You shouldn't look at one thing. Don't look down a barrel, excuse the expression. But look at all of the proof, and reach a decision on all of these cases, because they're intertwined. But I suggest to you that a reasonable punishment under the total facts and circumstances is life for the use of the robbery with a deadly weapon (Page 2025).

* * *

Rebuttal Argument by Mr. Strother

Mr. Strother: Ladies and gentlemen, most attorneys, I think, when they stand up at this point in trial, tend to say that they're going to be brief and when they're still talking half an hour, forty-five minutes, an hour, an hour and a half later, the jury

says, well, the first thing they said to me was not the truth so I'm not going to pay much attention to anything else

So I'm not going to tell you I'm going to be brief. I'm going to take all the time that I think is necessary, as is the proper purpose of this rebuttal argument, to respond to the items, the issues, raised by Mr. Dice in his closing summation – argument, whatever you'd like to call it – to you all.

First, and I think it's absolutely necessary under the facts – I'm not really sure, though I feel certain – Now, Mr. Dice, he's a fine attorney and he had no choice. He has to concede – and has conceded, I think – that his client, Gary Bradford Cone alias Gerald Mason Harmon, is the person who committed each and every one of the acts alleged in the indictments by the State.

So I'm not going to waste your time and my time and the Court's time re-arguing, yeah, that he's the one that did it. I mean, everybody has agreed to that.

The question really is down to was he criminally responsible for those actions? (Page 2064)

* * *

Let's look at Dr. Jaremko, the clinical psychologist who testified for the Defense, and who says he's an expert on the Vietnam War Syndrome.

Did he ever tell you – Did he ever tell you – Did they – He was their witness, not ours. Did he ever tell you – Did he ever tell you that that man saw

combat? Did he ever tell you that? Has anybody ever took that stand and told you that man was in combat? Anyone? No.

They've talked about him being in Supply, and that as part of his duties in Supply he had to handle body bags. Well, I'm sure that isn't pleasant, but that's not being in those jungles with bullets whizzing by your head. That's being in Supply. (Page 2069)

* * *

He's a research assistant – or something, at the University of Tennessee. As far as I heard, he didn't say a thing to you about treating people. And he's never testified in one of these courts before as an expert in a criminal case in front of a jury.

Well, what did Dr. Lipman say? One, every single thing he told you was based on what? Did he verify anything? Did he verify anything, based on what that man – that man who walked into the house and killed that ninety-four year old man and that seventy-nine year old lady. Just took his word for it. As if he had no interest, and he was just bound to be telling the truth. (Page 2071)

* * *

Mr. Strother: And what did Dr. Hutson base his examination on? Not just what that man told him. Because he told you he got the report from Florida.

He got our reports. And looked at every one of them, and that's what he based his opinion on.

What did he say? No mental defect. No evidence of Vietnam Stress Syndrome. That he could understand the wrongfulness of his conduct, and that he could conform his conduct to the requirements of the law.

I submit the State wins hands down that battle of the experts. Hands down. No question about it. That's the experts.

But I will even stand up here and say to you don't rely on that. Don't rely on that. Because he did all of these people see that man? Of course, Dr. Hutson did have the reports from Florida. But when did any of these people really see this man? Two years later. (Page 2073)

* * *

Does he talk about seeing pink elephants off the wall, or having hallucinations? Out of his mind?

He's a calm, cool, professional robber. And that's all you need. (Page 2074)

* * *

Unreasonable? No. The cool, deliberate act of a cool, deliberate murderer.

You saw also how that purse was dumped out. How the wallet was dumped out and searched for anything that (Page 2083) was in there. And he says,

oh, it's irrational. Irrational that he'd call his sister? What other choice does this man have but to turn for help anywhere he can? What other choice does he have? He knows they know who he is. They found all his identification, and everything else, in that automobile. So what difference does it make? They know who he is. No point in him trying to mask his identity. The only chance he's got is to get out of there, and he does that very, very, quickly.

No, you're not dealing with a crazy person, an insane man. A man, in their words, out of his mind. You're dealing, I submit to you, with a premeditated, cool, deliberate – and even cowardly, really – murder.

He wasn't so tough when it was he and Stovall one-on-one with their guns out. But he's pretty tough when it's a ninety-four year old man, and a seventy-nine year old lady.

Under the facts and circumstances in this case – And I'm not going to go over them all, but the verdicts as charged, I submit to you, are the only verdicts supported by the proof in this case: We, the jury, find Gary Bradford Cone guilty of murder in the first degree in the perpetration of a burglary as charged in the first count of each of those indictments, and I submit to you that that and that alone is the verdict that truth dictates and justice demands. (Page 2084)

APPENDIX FF: BRIEF AND ARGUMENT OF THE DEFENDANT

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

STATE OF TENNESSEE

Plaintiff-Appellee,

VS.

GARY BRADFORD CONE,

Defendant-Appellant

ORAL ARGUMENT REQUESTED

Shelby Criminal

No. 12

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT-APPELLANT, GARY BRADFORD CONE

THE COURT ERRED IN NOT STRIKING THE TESTIMONY OF WITNESSES BARBARA BENBROOK, CHARLES SLAUGHTER AND ILENE BLACKMAN ON FAILURE OF THE STATE TO PRODUCE STATEMENTS MADE BY THESE WITNESSES PRIOR TO TRIAL

In the instances involving Benbrook and Slaughter, statements had been made to officers of the Memphis Police Department which were not furnished to defense counsel upon proper request. The record clearly reflects that the defense had filed proper discovery motions in this case. These statements were contained in offense reports which were in control of the prosecuting attorney. Clearly,

they indicate variances between testimony actually given in trial and statements made prior to trial as to the ability of witnesses Benbrook and Slaughter to identify and to observe the Defendant.

In this case, the Court, despite repeated requests of Defense Counsel, quickly cut off the defense from any further access to statements made by the witness to police officers. Further, upon revelation by Sgt. Wilson of the Memphis Police Department that statements had actually been made by these witnesses to the Police Department which were not furnished to the Defendant, the Court improperly refused to order the testimony of the witnesses stricken.

Appellant respectfully argues that police reports are under the control of the State Attorney General and should first by reviewed by the Court to see whether or not material is contained within them which might qualify as a statement. Without this rudimentary step, the Court empowers the Attorney general with the enforcement of Rule 16 by allowing the prosecutor to decide whether or not a statement contained in an offense report is or is not a statement made by a witness or one which would be adopted by him or her in trial.

This is clearly pointed out in the case of State v. Robinson, 618 S.W. 2d 754 (Tenn. Cr. App. 1981):

From the Defendant's point of view the usual obstacle in securing inspection of a police report to impeach a third party witness is the method used to compile the report. Frequently, the interviewing officer will include in his report a general summary of the interviewee's oral statement, often reconstructed from memory at some point after the interview

occurred. Such a summary does not meet the requirements of Paragraph (F) (11) governing all statements and will not qualify under Paragraph (F)(i) unless after being reduce to writing it has been 'signed, adopted or approved,' by the person interviewed. State v. Robinson, 618 S.W. 2d 754, 759.

When, as here, these reports are not tendered to the Defendant upon proper demand, he does not have the ability to question the witness about prior contradicting statements for the purpose of impeachment. In this case, the defense contends that the demeanor of the person observed by the testifying witnesses was an important factor in this case, and the ability of the witness to testify as to what they saw or whom they saw is material.

Further, again, under Rule 16 of the Tennessee Criminal Rules of Procedure, Defendant contends that it is not up to the police department to decide whether or not a transcript of a statement made by a witness or the original tape recording made by that witness is sufficient to satisfy the demands of the Rule. Defendant respectfully contends that Rule 16 of the Rules of the Criminal Procedure, at 16, (F) defines what a statement is.

A stenographic, mechanical, electrical, or other recording of a statement, or a transcription or a summary thereof, which is essentially verbatim recital of an oral statement made by said witness.

Defendant would respectfully point out that the failure of a party to comply with a proper request under Rule 16 gives the Court power to "prohibit the party from introducing evidence not disclosed." Defendant asserts that this remedy was proper in

light of the State's failure to produce the taped statement of Ilene Blackman.

PETITIONER'S BRIEF

105

(7)

No. 07-1114

FILED
SEP 05 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR THE PETITIONER

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September 5, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

944 60

CAPITAL CASE – NO DATE OF EXECUTION SET

QUESTIONS PRESENTED

On state post-conviction review, the Tennessee courts refused to consider petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that the claim had already been "previously determined" in the state system. On federal habeas, a divided panel of the Sixth Circuit held that the state courts' ruling precluded consideration of the *Brady* claim. The court of appeals reasoned (in conflict with decisions of five other circuits) that the claim had been "procedurally defaulted." The court of appeals further reasoned (widening an existing four-to-two circuit split) that the state courts' ruling was unreviewable. Seven judges dissented from the denial of rehearing en banc.

The question presented is whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of *Brady v. Maryland*, which encompasses two sub-questions:

1. Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts?

2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

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BRIEF FOR THE PETITIONER

Petitioner Gary Bradford Cone respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The order of the en banc court of appeals denying the petition for rehearing en banc (Pet. App. 1a-5a) is reported at 505 F.3d 610. The panel decision (Pet. App. 6a-47a) is reported at 492 F.3d 743. A prior ruling of the panel (Pet. App. 48a-85a) is reported at 243 F.3d 961. The memorandum order of the district court (Pet. App. 86a-132a) is unreported.

JURISDICTION

The opinion and judgment of the court of appeals was filed on June 19, 2007. The order denying petitioner's timely petition for rehearing en banc was entered on September 26, 2007. Justice Stevens granted an application to extend the time to file the petition for certiorari until February 23, 2008, a Saturday. The petition was timely filed on the next business day, February 25, 2008. *See* S. Ct. R. 30. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 2254 of Title 28 of the United States Code states in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . .

STATEMENT OF THE CASE

A Vietnam veteran and recipient of the Bronze Star, petitioner killed an elderly couple in their home after evading police who were pursuing him following a robbery. Petitioner's sole defense at trial and his only argument in mitigation of the death penalty was that he lacked the mental state required for conviction of first-degree murder and was undeserving of the death sentence because he committed the crimes while suffering from a psychosis caused by a massive drug addiction resulting from post-traumatic stress disorder. The jury convicted petitioner and sentenced him to death. It later emerged that the prosecution had suppressed an array of exculpatory evidence that would have supported petitioner's defense. The state and federal courts nonetheless refused to consider petitioner's claim that the prosecution's conduct violated *Brady v. Maryland*, 373 U.S. 83 (1963).

1. Petitioner Gary Bradford Cone was convicted and sentenced to death in Tennessee state court following his conviction on two counts of first-degree murder for the brutal killing of an elderly couple after his flight from a robbery, during which he also shot and wounded a police officer and a bystander. Before trial, defense counsel sought any evidence that supported petitioner's innocence or was

otherwise exculpatory in nature, as well as any evidence that could impeach the prosecution's witnesses. J.A. 5-10. As exculpatory evidence, the prosecution, however, provided the defense with two brief statements concerning the possible time of the victims' deaths and nothing more. J.A. 11-12.

Petitioner's defense at trial was that he lacked the required mental state for a first-degree murder conviction and, in any event, should not be put to death, because at the time he committed the crimes he suffered from post-traumatic stress disorder and a drug-induced psychosis. As this Court explained in a previous opinion in this case:

> The defense conceded that [Cone] committed most of the acts in question, but sought to prove that he was not guilty by reason of insanity. A clinical psychologist testified that [Cone] suffered from substance abuse and posttraumatic stress disorders related to his military service in Vietnam. A neuropharmacologist recounted at length [Cone's] history of illicit drug use, which began after he joined the Army and escalated to the point where he was daily consuming "rather horrific" quantities. Tr. 1722-1763. That drug use according to the expert, caused chronic amphetamine psychosis, hallucinations, and ongoing paranoia, which affected [Cone's] mental capacity and ability to obey the law.

Bell v. Cone, 535 U.S. 685, 690 (2002).

Disputing petitioner's claim that he lacked culpability because he was mentally ill and an "addict out of control" (Tr. 2041), the prosecution

asserted that, in fact, petitioner was not a drug user at all and characterized his claims of drug addiction and abuse as "balon[e]y" (J.A. 107). In doing so, the prosecution established and emphasized that petitioner had not presented any direct evidence that he was a drug addict, and that petitioner's experts had merely rested their opinions on petitioner's statements about his own drug use. *See infra* at 41-42.

The jury rejected petitioner's defense, convicted him of first-degree murder, and sentenced him to death.

On direct review, the Tennessee Supreme Court affirmed the conviction and death sentence, noting that petitioner's defense had appeared to the jury to be "tenuous at best" because his experts' "testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse." *State v. Cone*, 665 S.W.2d 87, 90 (Tenn. 1984). The state supreme court also rejected petitioner's claim that the prosecution had failed to turn over certain witness statements in violation of state law. *Id.* at 94. This Court denied certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984).

2. The Tennessee state courts denied petitioner's first application for post-conviction review, which argued that he had received ineffective assistance of counsel. *See Cone v. State*, 747 S.W.2d 353, 355-58 (Tenn. Crim. App. 1987).

In June 1989, petitioner timely filed a second application, which (as initially amended) included an allegation that the prosecution had violated his federal constitutional right to due process under the Fourteenth Amendment by withholding material

exculpatory evidence in violation of *Brady v. Maryland*. J.A. 13-14 (¶ 35).

The State urged the trial court to dismiss petitioner's *Brady* claim without an evidentiary hearing because state law barred courts from considering post-conviction claims that were "previously determined" after a "full and fair hearing" (Tenn. Code Ann. § 40-30-112 (1990) (repealed 1995)), and according to the government the state courts had previously rejected that claim on direct appeal. J.A. 15. In support, the State cited the state supreme court's opinion on direct review, rejecting petitioner's separate state-law claim that the prosecution had violated Tennessee statutory law by not turning over certain required witness statements. J.A. 16 (citing *State v. Cone*, 665 S.W.2d at 94).

While petitioner's second application was pending, the Tennessee courts for the first time construed the state's public records act to allow a criminal defendant to review the district attorney's file in his case. *Capital Case Res. Ctr. v. Woodall*, No. 01-A-01-9104-CH-00150, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992). Exercising that right, petitioner learned for the first time (*see* J.A. 17-18 (¶ 41)) that the prosecution had suppressed an array of evidence confirming not only that petitioner had been a severe drug addict but also that he had indeed been under the influence of drugs at the time he committed the crimes. The evidence also included materials that would have directly impeached the prosecution witnesses who testified to the contrary. For example, a police officer who had testified that he had not seen evidence that petitioner was a drug user in fact had

issued multiple teletypes describing petitioner as a heavy drug user; the police moreover had taken witness statements indicating petitioner had been under the influence of drugs. *See generally infra* at 42-45.

On the basis of that evidence, petitioner timely amended his second state post-conviction application to allege a substantially more detailed claim under *Brady*:

> 41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments . . . because the State withheld exculpatory evidence which demonstrated that petitioner did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past, such evidence including but not limited to, statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins, and other persons unknown at this time, such statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollections of the officers or others. Such evidence was highly exculpatory and exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted petitioner and would not have sentenced him to death.

J.A. 20-21 (¶ 41).[1]

The post-conviction trial court, however, refused to hold an evidentiary hearing and dismissed petitioner's second amended post-conviction application. The court apparently accepted the state's prior assertion that the *Brady* claim had been previously determined, holding without elaboration that the claim was a restatement of a claim "heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition." J.A. 22.

The Tennessee Court of Criminal Appeals affirmed, ruling that petitioner's *Brady* claim was "previously determined either on direct appeal on in the appellant's first petition." *Cone v. State*, 927 S.W.2d 579, 580-81 (Tenn. Crim. App. 1995). Petitioner pressed the *Brady* claim in a petition to

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[1] There is no dispute that under Tennessee law petitioner's second amended application was timely filed and not impermissibly successive. *See generally State v. Masucci*, 754 S.W.2d 90 (Tenn. Crim. App. 1988) (newly enacted three-year post-conviction statute of limitations expires July 1, 1989); *Swanson v. State*, 749 S.W.2d 731, 735 (Tenn. 1988) (successive habeas application is permissible if it presents grounds that were not previously available) (citing *Pruett v. State*, 501 S.W.2d 807, 809 (Tenn. 1973)); *State v. Johnson*, No. 01C01-9610-CR-00442, 1997 WL 738587, at *3 (Tenn. Crim. App. Nov. 25, 1997) (deciding *Brady* claims when capital petitioner "filed his second post-conviction petition in February 1995 after receiving information in 1992 pursuant to a request under the Tennessee Open Records Act"); *O'Guinn v. State*, No. 02C01-9510-CC-00302, 1997 WL 210890 (Tenn. Crim. App. Apr. 29, 1997) (remanding for hearing on the merits of *Brady* claim in successive petition).

the Tennessee Supreme Court, which denied review. *Cone v. State*, CCA No. 02C01-9403-CR-00052 (Tenn. Mar. 4, 1996). This Court denied certiorari. 519 U.S. 934 (1996).

3. In 1997, petitioner sought federal habeas relief, asserting his *Brady* claim and seeking an evidentiary hearing. J.A. 23-30, 31-37; *see* Pet. App. 94a.[2] At the outset, the district court ordered the FBI – which had been involved in the investigation and an agent of which had testified at trial – to disclose its own files on the case. Those files contained still further exculpatory evidence, including multiple FBI bulletins that identified petitioner as a heavy drug user. *See infra* at 44.

In federal district court, respondent abandoned the mistaken argument that the state courts had resolved petitioner's *Brady* claim. Respondent argued instead that the claim was "first raised in his second post-conviction proceeding." J.A. 39. Respondent argued on that basis that the claim was "procedurally defaulted" because petitioner had not raised it earlier. *Id.* Respondent thus contended that the state post-conviction courts had deemed the *Brady* claim to have been "waived." *Id.* In support, respondent pointed to the state court of appeals' general statement that petitioner had waived "all claims raised in his second petition for post-conviction relief which had not been previously determined." *Id.* (citing *Cone v. State*, 927 S.W.2d

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[2] This case is accordingly governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

579, 582 (Tenn. Crim. App. 1995)). Respondent also argued that, in any event, petitioner's *Brady* claim lacked merit.

The federal district court declined to a hold a hearing on petitioner's *Brady* claim, concluding that petitioner had defaulted the claim by not sufficiently presenting it in the state courts. According to the district court, petitioner had merely presented the state post-conviction court with "conclusory assertions that the state had generally withheld exculpatory documents," as well as one specific claim relating to documents that would have impeached prosecution rebuttal witness Ilene Blankman. Pet. App. 112a. The district court accordingly deemed almost all of petitioner's *Brady* claims to be "procedurally defaulted" (Pet. App. 114a), "having never been presented to the state courts" (Pet. App. 112a-13a). The district court rested that finding on its reading of petitioner's second post-conviction application as it stood before petitioner amended it in light of the disclosure of the district attorney's file and the extensive amount of exculpatory evidence discovered in it. *Compare* Pet. App. 112a (citing J.A. 13-14 (initial *Brady* claim)) *with* J.A. 20-21 (subsequently amended *Brady* claim (¶ 41)). With respect to the exculpatory FBI documents, which petitioner did not obtain until the federal proceedings, the district court held that petitioner could not demonstrate prejudice from their suppression. Pet. App. 118a-19a n.9.

4.a. Petitioner appealed. Respondent changed positions, again. Rather than arguing that petitioner's *Brady* claim had been raised either too early (*i.e.*, it was previously determined on direct

appeal (*see supra* at 5)), or too late (*i.e.*, it was procedurally defaulted because it was raised in the second post-conviction application (*see supra* at 8)), respondent now argued to the Sixth Circuit that the claim was never presented *at all*: "Cone's *Brady* claims were simply never raised in state court." J.A. 41. In doing so, respondent failed to address the amended *Brady* claim contained in petitioner's second amended post-conviction application. *Id.*

The Sixth Circuit affirmed not on the ground advanced by respondent before it, but on respondent's abandoned argument that the state post-conviction court had refused to adjudicate the *Brady* claim because it had been "previously determined" on direct review. Pet. App. 59a. The court of appeals thus held (contrary to both respondent's arguments and the district court's decision) that "this claim was exhausted," but it nonetheless deemed the state courts' holding that the claim was "previously determined" to be an "'independent and adequate'" state ground for rejecting the claim. *Id.*

Though the district court had not held an evidentiary hearing on the *Brady* claim, the panel in dictum went on to briefly indicate its view that some of the withheld evidence was not material under *Brady*. Considering "each category of [withheld] documents separately" (Pet. App. 57a), the court of appeals addressed a single piece of evidence, summarily opining that a report which stated that another police department knew petitioner was a "heavy drug user" was not material "because of the overwhelming evidence of Cone's guilt" (Pet. App. 59a-60a). The court did not address the effect of the

Brady evidence on the jury's decision to impose the death penalty. Nor did it explain why it deemed immaterial both the evidence that petitioner was under the influence of drugs when he committed the offenses, and the evidence that would have impeached the testimony of the witnesses called by the prosecution to rebut petitioner's defense of amphetamine psychosis.

b. Turning to other grounds raised by petitioner in his federal habeas application, the court of appeals twice vacated petitioner's death sentence. It first held that petitioner's counsel had provided constitutionally ineffective assistance of counsel at the capital sentencing hearing. Pet. App. 85a. This Court reversed, holding that counsel's failure to present a closing argument at sentencing did not require habeas relief. 535 U.S. 685 (2002). This Court concluded that petitioner's counsel made a sound strategic judgment regarding whether to argue for mitigation in light of the evidence available and the circumstances at the time. *Id.* at 699-700.

On remand, the court of appeals held that petitioner's death sentence was invalid because the jury had been presented with an unconstitutionally vague aggravating circumstance. *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004). This Court reversed, holding that the aggravating circumstance was appropriately narrowed by the state courts. 543 U.S. 447 (2005) (per curiam). This Court reasoned that the state courts had properly determined that the jury could assess the aggravating and mitigating circumstances reflected by the evidence at trial. *Id.* at 456-57.

On the second remand, the court of appeals returned to petitioner's *Brady* claim. Respondent, however, no longer defended either the state's initial position (*see supra* at 5) or the Sixth Circuit's prior holding (*see supra* at 10) that the claim had been "previously determined." Instead, respondent asserted that the claim had been defaulted and that petitioner had not identified "any justifiable cause for his failure to raise the . . . claims in a timely manner in state court." J.A. 44. Respondent once again did not address petitioner's amended state court *Brady* claim (J.A. 20-21 (¶ 41)), the fact that the claim was raised after petitioner first secured access to the district attorney file (J.A. 17), the state's own previous argument that the *Brady* claim *had* been decided by the state courts (J.A. 16), or the state post-conviction courts' rulings agreeing with that contention (J.A. 22).

c. By a divided vote, the Sixth Circuit adhered to its prior ruling that petitioner had procedurally defaulted his *Brady* claim because the state post-conviction court had deemed it to have been "previously determined." Pet. App. 22a-24a. "The Tennessee courts held that Cone's *Brady* claims were previously determined under [the state's procedural] rule, and [the panel's prior decision] found that Cone's claims were therefore procedurally defaulted." Pet. App. 22a. The panel also held that the state post-conviction courts' conclusion that the claim had been previously determined was unreviewable on federal habeas because that "holding amounted to an independent and adequate state law ground barring our considering the claims." Pet. App. 18a.

The majority briefly reiterated in dictum its view that the *Brady* claim lacked merit. Pet. App 25a. According to the majority, "Cone's claim is actually better described as four separate *Brady* claims because Cone asserts that four groups of documents were withheld from him." Pet. App. 18a. It stated that it had "examined these four claims" in its earlier opinion. *Id.* In the view of the majority, the jury had before it "persuasive testimony that Cone was not under the influence of drugs" (Pet. App. 25a) and "had already heard substantial evidence that he was a drug user." (Pet. App. 26a). With respect to the FBI reports that petitioner had been provided for the first time when he filed his federal habeas petition, the majority held that petitioner had not been prejudiced by their suppression. Pet. App. 25a.[3]

d. Judge Merritt dissented. Pet. App. 31a-47a. In his view, the state and federal courts had been led not to adjudicate petitioner's *Brady* claim by "the misrepresentations of the record in the case by the Tennessee Attorney General and his appellate staff," which had engaged in a "complete falsification of the

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[3] The Sixth Circuit's prior panel opinion had erroneously understood that petitioner's counsel received the FBI reports when he was provided the files of the district attorney and, on that basis, mistakenly concluded that petitioner defaulted any claim relating to the reports by not raising them in his application for state post-conviction review. Pet. App. 61a. There is no factual dispute, however, that the files were in the possession of the FBI and petitioner received them only in response to the district court's order when he filed his federal habeas opinion, *see* Pet. C.A. Br. 11, and in its subsequent opinion, the Sixth Circuit majority abandoned its earlier rationale for its decision.

procedural record." Pet. App. 33a. As he explained, petitioner had properly presented his *Brady* claim to the state and federal courts, which mistakenly refused to reach them. *Id.* Judge Merritt reasoned, moreover, that the majority announced its "conclusory statement" that the suppressed evidence was not material "without any analysis of the record, or the *Brady* and mitigation line of cases." Pet. App. 46a. Judge Merritt concluded that the withheld documents "directly contradict" the prosecution's central submission that petitioner was not a drug addict and was not suffering a drug-induced psychosis at the time of the crimes. *Id.*

5. Petitioner sought rehearing en banc. Directed to respond, respondent finally acknowledged that (contrary to its assertions to the panel) petitioner had in fact presented an amended *Brady* claim in his second amended state post-conviction application (*see* J.A. 47 n.7) and further pointedly advised the court of appeals that "[t]he attorney who authored the State's principal brief" before the panel was no longer employed by the State (*id.*). Respondent furthermore did not defend the panel majority's holding that petitioner's *Brady* claim was not cognizable because the state post-conviction court had deemed it to be "previously determined." Rather, respondent posited a new theory, arguing that, although petitioner had presented the claim in state court, he had not done so with sufficient specificity to preserve it for federal review.

The Sixth Circuit denied rehearing en banc. Seven judges dissented (Pet. App. 1a-5a) on the ground that the court should not "allow[] Cone to be executed without any effort to get to the merits or

have the district court or a state court investigate the prosecution's concealment of strong exculpatory evidence of drug addiction" (Pet. App. 3a-4a). The dissent sharply criticized respondent's "inconsistent claims that the *Brady* claim was both 'previously determined' and 'never raised'" (Pet. App. 2a), which the dissent concluded amounted to "a prosecutorial smoke screen designed to obscure, confuse and mislead the court" (Pet. App. 4a). The dissent also rejected respondent's newest theory that petitioner did not raise his claim in state court with sufficient specificity because he did not "recite and describe in detail each of the fourteen police documents and witness statements containing the exculpatory evidence of drug addiction withheld by the prosecution." Pet. App. 3a. That argument, the dissent recognized, was "inconsistent with pleading rules under both Tennessee and federal law," which merely require that the defendant present a "colorable claim" under federal law to preserve it for federal habeas review. Pet. App. 4a (quoting *Arnold v. State*, 143 S.W.3d 784 (Tenn. 2004), and citing *Picard v. Connor*, 404 U.S. 270, 278 (1971)).

6. Petitioner sought certiorari in this Court. In response, respondent did not defend *any* of the varied grounds on which he had successfully urged the state and federal courts not to decide petitioner's *Brady* claim: that the claim was "previously determined" (J.A. 15); that petitioner waived the claim by presenting it in his second application but not the first (J.A. 39); that petitioner had never presented it to the state courts (J.A. 41); or that petitioner had presented it with insufficient detail to preserve it for federal review (J.A. 47). Instead, respondent addressed only the merits of the claim, arguing that

the Sixth Circuit had determined on the merits that the evidence suppressed by the prosecution was not material to petitioner's defense and thus not subject to disclosure under *Brady*. BIO 8-9.

This Court granted certiorari. 128 S. Ct. 2961 (2008).

SUMMARY OF ARGUMENT

I. The Sixth Circuit held that petitioner procedurally defaulted his *Brady* claim because the state courts had concluded on post-conviction review that the claim had been "previously determined" on direct review. The Sixth Circuit's ruling was doubly wrong.

A. A prisoner's repeated presentation of his federal claim to the state courts establishes that the claim has been *exhausted*, not that it has been *defaulted*. The doctrine of procedural default guarantees the state courts the opportunity to correct their own federal constitutional errors. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Petitioner gave the Tennessee courts that opportunity. Hence, the "effect upon the availability of federal habeas" of "a prohibition against *further* state review – for example, . . . a rule . . . preventing the relitigation on state habeas of claims raised on direct appeal" – "is nil." *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991).

B. The Sixth Circuit further erred in holding that a federal habeas court is powerless to review a state court's assertion that a federal claim has been defaulted. Preliminarily, it is undisputed that the state courts erred in this case. Petitioner did not present his *Brady* claim on direct review; he was not

even aware of the claim's foundation until the post-conviction proceedings, when state law for the first time granted him access to the district attorney's files.

Nothing required the court of appeals to put on blinders and ignore that the state courts erred in refusing to adjudicate petitioner's federal constitutional claim, particularly given that the case presents no contested issue regarding the meaning of state law. "[F]ederal habeas courts must ascertain *for themselves* if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds." *Coleman*, 501 U.S. at 736 (emphasis added). It is thus well settled by a long line of this Court's precedent that the federal courts will examine the adequacy of a state court's invocation of a rule of procedural default. A contrary rule would threaten the role of the federal courts generally – and of this Court in particular – as the arbiter of federal constitutional law, as it would permit the state courts to thwart access to federal habeas corpus through the erroneous, unreviewable assertion that federal constitutional claims had been defaulted.

II. The Sixth Circuit discussed the merits of petitioner's *Brady* claim only in dictum. To the extent that this Court reaches the issue, it should hold that the claim is meritorious. At the very least, petitioner was entitled to an evidentiary hearing in the district court to address whether the evidence suppressed by the prosecution was material.

The only disputed element of petitioner's *Brady* claim is whether the suppressed evidence indicates that the trial verdict is not "worthy of confidence."

Kyles v. Whitley, 514 U.S. 419, 434 (1995). Here, that standard is easily met. Petitioner offered a single defense – supported by substantial expert testimony – at both the guilt and sentencing stages: he committed the crimes while in the throes of an amphetamine psychosis, coupled with post-traumatic stress disorder. But the prosecution destroyed that defense, and succeeded in portraying petitioner as "a premeditated, cool, deliberate – and even cowardly, really – murderer" (J.A. 113), by establishing that petitioner had presented the jury with no direct evidence of his drug addiction and use. Petitioner's experts had relied only on petitioner's own representations to that effect. And the State put forward its own witnesses to suggest that petitioner was not a drug addict.

In reality, however, the State suppressed considerable evidence that would have validated petitioner's defense. The prosecution withheld statements from witnesses who had seen petitioner recently before and soon after the murders to the effect that petitioner appeared to be wild and on drugs. The State also possessed but withheld a report from another police department that petitioner was a known heavy drug user.

Beyond that, the prosecution suppressed evidence that would have directly impeached its own fact witnesses, whose statements were in turn the basis for the testimony of a prosecution expert. A police sergeant testified for the State that petitioner had no needle marks on his body, but the prosecution did not disclose that the sergeant had personally authorized multiple teletypes describing petitioner as a heavy drug user. An FBI agent testified that

petitioner was calm when interviewed after his arrest, but petitioner was not provided with multiple FBI documents stating that petitioner was a heavy drug user. The prosecution also suppressed documents impeaching the testimony of the final prosecution witness, an acquaintance of petitioner who stated that she had not seen evidence of him using drugs.

If disclosed to petitioner, this evidence would have validated his trial defense and the testimony of his two expert witnesses. Contrary to the State's characterization of petitioner as a cold-blooded murderer, the jury would have been presented with a compelling case of petitioner as a person out of control as a consequence of a grave drug addiction brought on by post-traumatic stress disorder from his service in Vietnam. The evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

The Sixth Circuit's contrary dictum does not withstand scrutiny. The court of appeals avowedly evaluated the evidence suppressed by the prosecution "as four separate *Brady* claims" (Pet. App. 18a), and considered "each category of [withheld] documents separately" (Pet. App. 57a). This Court's precedents, by contrast, require that materiality be determined considering the evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436. Even in its piecemeal assessment, the court of appeals ignored significant pieces of evidence altogether. And the Sixth Circuit's reliance on the "overwhelming evidence of Cone's guilt" (Pet. App. 59a-60a) fundamentally misapprehends petitioner's defense, which

acknowledged that he committed charged acts but argued that he lacked the required mental state for conviction of first-degree murder or at least should not be put to death.

This Court should accordingly reverse the Sixth Circuit with directions to enter judgment in petitioner's favor on his *Brady* claim or, at a minimum, to remand the case to the district court for an evidentiary hearing on the claim.

ARGUMENT

"[T]he Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963); *see Branch v. State*, 469 S.W.2d 533 (Tenn. Crim. App. 1969) (same). And the government's obligation to ensure a fair and reliable criminal process, rather than to be the "architect of a proceeding that does not comport with standards of justice" (*Brady*, 373 U.S. at 88) weighs most heavily when government seeks to impose death as punishment for a crime.

The lower courts' disposition of this case is the antithesis of that principle. Petitioner's sole defense at both the guilt and sentencing stages was that he acted while under a drug-induced psychosis brought on by post-traumatic stress disorder from his service in Vietnam. The State sought to establish through cross-examination and its own witnesses that petitioner had no drug problem, was not under the influence of drugs at the time of his arrest, and was a stone-cold killer. Materials uncovered from the State's case file – materials that were never turned over to the defense – demonstrate that the prosecution in fact knew that petitioner's defense had

considerable merit. Police officers knew of his extensive drug history and received statements from witnesses who observed him acting erratically and under the apparent influence of drugs at the time of the crimes. Other documents directly impeached the testimony and credibility of key witnesses.

Having grossly misled the jury at trial, rather than admit error or seek a new trial or capital sentencing before a jury that could consider all of the evidence relevant to the defense, the State has spent the last two decades contending (and the state and federal courts have variously held) that petitioner's execution should go forward because his constitutional *Brady* claim variably (i) was decided by the state courts (which it was not), (ii) was procedurally defaulted because it was first raised in a second post-conviction claim (which was neither accurate nor legally relevant), (iii) was waived (which it was not), (iv) was never presented at all in state court (it was), (v) was barred from federal court review *because* the claim was properly raised and exhausted in state court (which makes no sense), (vi) was defaulted because it was filed too late in state court (which it was not), (vii) was previously determined (which it was not), (viii) was raised but was not described with sufficient specificity (which was incorrect), and (ix) was resolved on the merits in federal court (which it was not). The State has been nothing if not consistent in its inconsistency.

Out of that mélange of arguments and rulings, the only questions before this Court are (i) whether petitioner's longstanding effort just to have his *Brady* claim heard in court is barred because the claim was "previously determined" when presented to the state

courts and on that basis "procedurally defaulted," and (ii) whether the claim lacks merit.[4] Precedent and logic compel the conclusion that federal habeas review of a constitutional claim as substantial as petitioner's neither is defaulted by the claim's prior presentation to the state courts nor is resolved by appeals court dicta uttered without any evidentiary hearing or inquiry.

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[4] Only those two questions were pressed by respondent or passed on by the court below, and only those questions are encompassed within the questions this Court granted certiorari to decide. Respondent, in fact, has acknowledged that his prior assertion that petitioner had failed to present the *Brady* claim *at all* was false because it completely failed to account for paragraph 41 of his second amended state post-conviction application. *See supra* at 14; J.A. 47 n.7. Respondent also did not argue before the Sixth Circuit panel or in his brief in opposition to certiorari in this Court either (i) that petitioner defaulted his *Brady* claim by not raising it prior to his second amended state post-conviction application, or (ii) that paragraph 41 of that application was insufficiently detailed to preserve the claim for federal habeas review. *See supra* at 14 (respondent did not acknowledge paragraph 41 prior to response to request for rehearing). Nor did the court of appeals decide either of those questions. Those issues accordingly are not before this Court. *See generally Illinois v. Gates*, 462 U.S. 213, 221-22 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (this Court has jurisdiction over questions "pressed in or passed upon" by panel below); *Caterpillar v. Lewis*, 519 U.S. 61, 75 n.13 (1996) ("Under this Court's Rule 15.2, 'a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived.'"); *Schiro v. Farley*, 510 U.S. 222 (1994) (noting that finding of waiver is particularly appropriate when the issue would preclude resolution of questions on which certiorari was granted).

I. Petitioner Could Not Procedurally Default His *Brady* Claim By Twice Presenting It To The State Courts.

The Sixth Circuit held that the *Brady* claim in petitioner's habeas application should be summarily dismissed, without an evidentiary hearing or consideration on the merits, because the state post-conviction court had refused to consider that claim on the ground that it had been "previously determined" on direct review. Pet. App. 18a. According to the court of appeals, such a twice-presented claim is "procedurally defaulted" because a state rule proscribing re-adjudication of a claim constitutes "an independent and adequate state law ground barring [the federal court from] considering the claims" on habeas corpus. *Id.* The Sixth Circuit further concluded that it was completely powerless to determine whether the state court was correct and consistent in applying its state law rule to petitioner's case. *Id.* Neither conclusion withstands scrutiny.

A. A State Court Prohibition Against The Repeated Adjudication Of A Federal Constitutional Claim Does Not Give Rise To A "Procedural Default" For Purposes Of Federal Habeas Corpus.

Under the doctrine of "procedural default," a state defendant may not pursue a claim on federal habeas that he previously failed to present to the state court, unless he shows either "cause and prejudice" for that default or that a fundamental miscarriage of justice will result. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Procedural

default occurs because the petitioner's interest in obtaining federal review of a constitutional claim succumbs to "concerns of comity and federalism" (*id.* at 730) when he "prevents adjudication of his constitutional claims in state court" (*id.* at 748). The procedural default doctrine thus precludes consideration of "contentions of federal law which were not resolved on the merits in the state proceeding due to [the petitioner's] failure to raise them there as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).[5]

Under Tennessee law, a claim decided by the state courts on direct review will not be re-adjudicated on state post-conviction review. *See* Tenn. Code Ann. § 40-30-106(f) (2006); *see also* Tenn. Code Ann. § 40-30-111 (1990) (repealed 1995). But that state law has no bearing on the federal law question of whether petitioner's claim was properly exhausted for purposes of federal habeas law. Procedural default is a rule of federal law designed to ensure that state courts have at least one full and fair opportunity to consider a claim before federal courts intervene to review a state-court conviction. *See, e.g.*, *Coleman*, 510 U.S. at 731-32. Once a claim

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[5] *See, e.g.*, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (failure to object at trial to psychiatrist's testimony); *Murray v. Carrier*, 477 U.S. 478 (1986) (failure to raise claim in state court appeal); *Engle v. Isaac*, 456 U.S. 107 (1982) (failure to object at trial to jury instructions); *Francis v. Henderson*, 425 U.S. 536 (1976) (failure to timely advance challenge to composition of grand jury); *Davis v. United States*, 411 U.S. 233 (1973) (failure to comply with rule requiring pretrial objection); *Brown v. Allen*, 344 U.S. 443 (1953) (failure to timely file appeal papers).

has been squarely presented to the state courts in fulfillment of the procedural default doctrine, this Court has been clear that the vagaries of state law do not cut off federal habeas review.

If the state court was correct that petitioner's *Brady* claim had been adjudicated by the state courts on direct review (*but see infra* Part II-B), petitioner did not "default" his federal claim by reasserting the *Brady* claim a second time on state post-conviction review. Quite the opposite, petitioner's proper preservation of the claim on direct review would open the door to federal habeas review; giving the state courts a second opportunity to consider the question by raising it again on post-conviction review would not close that door. Instead, the prior presentation of those claims (once or twice) means that the claims have been properly *exhausted* in the state system, not *defaulted*.

This Court has in fact already decided this question. In *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the California courts on post-conviction review had rejected the petitioner's *Miranda* claim based on a state rule that, like Tennessee's, prohibited the relitigation of claims previously decided on direct review. In words that control this case, the Court specifically held that the "effect upon the availability of federal habeas" of "a prohibition against *further* state review – for example, . . . a rule . . . preventing the relitigation on state habeas of claims raised on direct appeal" – "is nil." *Id.* at 804 n.3. Such "state rules against superfluous recourse have no bearing upon [a petitioner's] ability to raise [a federal] claim in federal court." *Id.* at 805. Unsurprisingly, every other federal court of appeals

to consider this question – six circuits in all – has reached the opposite conclusion from the Sixth Circuit in this case, finding no procedural default in the repeated presentation of a claim to state courts. *See Page v. Lee*, 337 F.3d 411, 415 n.1 (4th Cir. 2003); *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996); *Brecheen v. Reynolds*, 41 F.3d 1343, 1358 (10th Cir. 1994); *Bennett v. Whitley*, 41 F.3d 1581, 1582 (5th Cir. 1994); *Silverstein v. Henderson*, 706 F.2d 361, 368 (2d Cir. 1983); *cf. Davis v. Lambert*, 388 F.3d 1052, 1058 (7th Cir. 2004). The Sixth Circuit's directly contrary ruling here – a decision that did not mention, let alone attempt to distinguish *Ylst* – thus collapses in the face of dispositive precedent.

The Sixth Circuit's rule that claims are defaulted when consistently presented to state courts at every turn also makes no sense. The state law prohibition on the re-litigation of claims is simply a statutory codification in the habeas context of the principles of res judicata and collateral estoppel, "by which petitioners are bound by previous judgments and determinations." *Rickman v. State*, 972 S.W.2d 687, 696 (Tenn. Crim. App. 1997); *cf. Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").[6]

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[6] That is also the consistent understanding of other state courts that prohibit the re-adjudication of claims on state post-conviction review. *See, e.g., People v. Meeks*, 334 N.E.2d 253, 256 (Ill. App. Ct. 1975) ("The purpose of a post-conviction

The application of such a bar to re-litigation, of course, suggests not that the defendant deprived the state courts of the opportunity to decide the claim – which is what animates the federal procedural default doctrine – but that the defendant gave the state courts a second opportunity to right the alleged wrong, albeit an opportunity that it declined. Petitioner thus did not in any respect undermine the state courts' "interest in correcting their own mistakes." *Coleman*, 501 U.S. at 732. Petitioner's "superfluous recourse" to state post-conviction review (*Ylst*, 501 U.S. at 805) is thus beside the point because redundancy is the opposite of a default, and penalizing the diligent presentation of a claim to state courts would disserve, not advance, the principles of "comity and federalism" (*Coleman*, 501

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hearing is to test the constitutional integrity of proceedings which result in a conviction and to provide a remedy to those persons whose substantial constitutional rights have been violated. It is not intended to provide a defendant with a second review of matters which have already been considered or could have been considered, since the piecemeal invocation of post-conviction remedies is to be discouraged."); *Rojem v. State*, 829 P.2d 683, 684 (Okla. Crim. App. 1992) ("Due to the necessity of finality of judgments, our review of an appeal from denial of an application for post-conviction relief is limited to those issues which were not and could not have been raised on direct appeal. Issues which were raised and have been decided on direct appeal are barred from reconsideration by res judicata."); *see also Green v. French*, 978 F. Supp. 242, 251 (E.D.N.C. 1997) (stating that North Carolina's prohibition against re-adjudication "is a codification of the rule of res judicata; it embodies the notion that, if one state court considers a claim on the merits, the claimant is not entitled to a second bite at the apple in the state judicial system").

U.S. at 730) that underlie the procedural default doctrine.

Moreover, the Sixth Circuit's holding would regularly put habeas petitioners in the untenable position of guessing – with their life or liberty on the line – whether a claim will later be deemed to have been previously adjudicated. In a substantial body of cases, such as those involving state appellate courts' summary dispositions of defendants' claims, it will be ambiguous whether a federal claim was in fact resolved on direct review. *See, e.g.*, *Fry v. Pliler*, 127 S. Ct. 2321, 2324 (2007). In such a case, a petitioner faces an extraordinary dilemma in deciding whether to assert the claim on state post-conviction review. If he does, and the state post-conviction court subsequently deems the claim to have been previously adjudicated, the claim is (on the Sixth Circuit's view) defaulted for federal habeas corpus purposes. If he does not assert the claim, and the federal habeas court subsequently deems the claim not to have been decided on direct review, it will be denied on the ground that it was not properly exhausted. Requiring habeas petitioners to play such procedural roulette with their claims would be especially perverse in death penalty cases, where counsel have an obligation to advance all available potentially meritorious claims, and "[p]ost-conviction counsel" in particular are admonished to "seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation." American Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.5(C) (2003). Congress cannot have intended to create a scheme

under which habeas petitioners sentenced to death are literally defaulted both if they do and if they do not present a claim.

B. A Federal Court May Determine Whether A State Court Erred In Its Determination That A Federal Constitutional Claim Falls Subject To A State Default Or Waiver Rule.

Even if the Sixth Circuit were correct that the double exhaustion of a claim in state court may cause that claim to be procedurally defaulted (*but see supra* Part I-A), that would do nothing to sustain the judgment below. There is absolutely no basis in the record, law, or fact to support the conclusion that petitioner's *Brady* claim was adjudicated on direct review in the state court system. Notably, throughout the federal court proceedings, respondent has *never* defended either its prior (but long-since abandoned) arguments asserting adjudication on direct review or the factual or legal accuracy of the state post-conviction courts' rulings that petitioner's *Brady* claim had been "previously determined." Nor did the Sixth Circuit suggest that those prior state court rulings were correct. Instead, the court of appeals declared that a federal habeas court must put blinders on and give full effect to those undefended and indefensible rulings. That is wrong.

1. To begin with, there is *no question* that petitioner's *Brady* claim was not adjudicated on direct review and, in fact, did not even materialize until state law for the first time granted him access to the district attorney's case file on post-conviction review. After his conviction and sentence, petitioner appealed. At that time, petitioner was not and could

not have been aware of the exculpatory evidence that had been withheld; he accordingly did not raise a federal constitutional *Brady* claim on direct review. He did allege a violation of state law governing the required disclosure of statements by certain testifying witnesses. *State v. Cone*, 665 S.W.2d 87, 94 (Tenn. 1984). But that claim, by its terms, was not a federal constitutional claim under *Brady* or otherwise. *Id.*

In 1984, petitioner filed his first state post-conviction application, which the trial court denied, and the state court of criminal appeals affirmed. *See Cone v. State*, 747 S.W.2d 353 (Tenn. Crim. App. 1987). That application similarly did not include a *Brady* claim. *See generally id.*

Petitioner first raised this *Brady* claim in his timely second amended state post-conviction application. He elaborated on that claim to address the evidence now at issue after he received access to the district attorney's files and first became aware of the suppressed evidence of governmental witnesses and records. *See supra at* 5. Thus, the *Brady* claim simply *could not* have been – and necessarily was not – "previously determined" on direct appeal in 1984.

Simply put, the state courts' contrary rulings were mistaken and apparently were made in reliance on the State's own erroneous equation of petitioner's state-law claim with a federal constitutional claim under *Brady* (*see supra* at 5, 7) – a conflation of issues that the State has long since abandoned.

2. The Sixth Circuit's holding that federal habeas courts have no authority to review the correctness of the state courts' rulings refusing to adjudicate petitioner's federal constitutional claim lacks any

basis in law or precedent. Indeed, time and again, this Court has held that federal courts are not only empowered, but obligated to determine whether a procedural bar was properly applied by a state court. That obligation is manifest when the question is not the proper construction of state law, but, as in this case, is merely whether a federal constitutional claim will be extinguished because the state courts simply erred in their understanding of whether that federal claim had been previously presented.

Thus, in *Coleman v. Thompson*, this Court held that "federal habeas courts must *ascertain for themselves* if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds." 501 U.S. at 736 (emphasis added). Likewise, it is long settled that "the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (internal quotation marks and citation omitted). Thus, when considering a state court judgment on direct review, it is "this Court's duty to ascertain whether the procedural grounds relied upon by the state court independently and adequately support its judgment." *Wolfe v. North Carolina*, 364 U.S. 177, 186 (1960); *see also* Wayne R. LaFave, *Criminal Procedure* § 28.4(b), at 1336 (4th ed. 2004) ("[T]he adequacy of the state's application of its procedural rule remains a threshold issue in any case in which procedural default is raised as a defense by the state.").

And this Court has repeatedly exercised that duty. For example, this Court looks behind assertions of independent and adequate procedural or

substantive state law grounds to determine if they rest on a "fair or substantial" basis, not hesitating to find the asserted ground inadequate when it does not meet that threshold. *See, e.g.*, *Wolfe*, 364 U.S. at 193 (finding state procedural ground adequate but only after "independent examination of North Carolina law"); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (looking behind two proffered non-federal grounds and finding neither adequate); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944) (looking behind non-federal ground and finding it not to rest on a "fair and substantial basis"); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 282-83 (1932) (looking behind non-federal ground and finding it "unsubstantial and illusory").

The federal courts' obligation to consider for themselves whether a procedural bar was properly invoked is also reflected in the settled principle that only firmly established and consistently applied procedural rules will bar review in federal court. For example, in *Ford v. Georgia*, 498 U.S. 411 (1991), the state courts applied "a sensible rule" that "any *Batson* claim [must] be raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths." *Id.* at 422. The state court furthermore deemed that requirement "to be a 'valid state procedural bar' to [the] petitioner's claim." *Id.* This Court, however, looked behind the state court's finding of default and rejected it, concluding that the state's procedural requirement was not firmly established at the time the petitioner had been tried. *Id.* at 425.

In *Johnson v. Mississippi*, this Court looked behind the Mississippi Supreme Court's conclusion

that the petitioner had waived his right to challenge the validity of a prior conviction that had been used to enhance his sentence because he had not raised the claim on direct appeal. The court found "no evidence that the procedural bar relied on . . . ha[d] been consistently or regularly applied," and therefore concluded that it was not an independent and adequate state ground supporting the state court's judgment. 486 U.S. at 587. Likewise, this Court found no independent and adequate state ground barring its review in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), because the procedural rule purportedly precluding review was not "strictly or regularly" followed. *Id.* at 264. And in *Dugger v. Adams*, 489 U.S. 401 (1989), this Court held that the petitioner had procedurally defaulted his claim, but only after engaging in an extended analysis to determine that the state procedural rule had been consistently and regularly applied. *Id.* at 410 n.6.

Even when a state procedural rule is firmly established and consistently applied, this Court will look to ensure that the rule does not "force resort to an arid ritual of meaningless form" (*Staub*, 355 U.S. at 320) and that in the particular case it is not "exorbitantly appl[ied]" (*Lee v. Kemna*, 534 U.S. 362, 376 (2002)). In addition, this Court will look behind the application of a procedural bar to determine if the petitioner has substantially complied with the procedural rule's "essential elements," and "nothing would [] be[] gained by requiring" perfect adherence to it. *Id.* at 385 & n.15. It was on this basis that this Court concluded, in *Lee v. Kemna*, a federal habeas case, that the state courts' assertion of failure to comply with a state procedural rule regulating

continuance motions was "inadequate to block adjudication of [the] federal claim." *Id.* at 381.

Certainly nothing in the federal habeas corpus statute hamstrings the federal courts' ability to determine whether the state courts erred in refusing to adjudicate petitioner's federal *Brady* claim. Congress has provided that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). That is no barrier here. First, even if that "presumption" applied in this context, it is just that – a presumption – and one that is readily overcome by the record in this case (underscored by respondent's failure to even defend the state courts' rulings). *See supra* at 29-30.

Second, that presumption does not arise here because the question whether a claim was "previously determined" is a legal issue, not a "factual issue," and does not even glancingly implicate factual matters that Congress left to the judgment of state courts, such as the weight to be given various evidence. *See, e.g.*, 28 U.S.C. § 2254(d)(2) (stating that writ of habeas corpus may be granted if state court's ruling "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings"); *id.* § 2254(f) (stating that on challenge to "the State court's determination of a factual issue," federal court must be provided with "that part of the record pertinent to a determination of the sufficiency of the evidence").

Moreover, independent federal review of the adequacy of state court judgments serves two crucial functions. First, it protects the fundamental right of individuals who properly preserve their

constitutional claims to have those claims considered on the merits by a federal habeas court at least once. When an individual alleges a violation of his constitutional rights, those rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." *Lawrence*, 286 U.S. at 282. State courts may not evade their obligation to decide constitutional questions simply by citing an unsubstantiated state law basis for their judgment. *See id.*

Second, independent review is essential to preserve this Court's established and constitutionally vital role as the final arbiter of questions of federal law. If a state court's assertion of a "plainly untenable" state procedural ground automatically removed a case from this Court's jurisdiction, this Court's "power to review easily may be avoided" and enforcement of the Federal Constitution frustrated. *Staub*, 355 U.S. at 319; *see also Wolfe*, 364 U.S. at 185 ("[A] state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support.").

Both of those rationales are fully implicated here. Had the Sixth Circuit conducted even a cursory examination of the accuracy of the state courts' finding that the *Brady* claim was previously determined, the erroneousness of that decision would have been laid bare and, even under the most deferential standard of review, would have opened the door to federal consideration of petitioner's claim. The state courts simply could not have previously decided a *Brady* claim that did not exist until years

after the state courts' prior rulings, when petitioner first was permitted access to the district attorney's files. The state courts' conclusion is, in fact, so demonstrably wrong – so clearly lacking a "fair or substantial basis" (*Wolfe*, 364 U.S. at 193), and the state rule so "exorbitantly appl[ied]" (*Kemna*, 534 U.S. at 376) – that the State itself does not even attempt to articulate a defense of it. Nothing in federal habeas law requires federal courts to turn their backs on errors in invocations of state procedural law that are so profound that the State declines to defend them. Furthermore, a holding that even facially erroneous applications of a state procedural rule can preclude federal habeas review would abdicate the federal court's responsibility to serve as the ultimate interpreter and enforcer of the Federal Constitution. Under the Sixth Circuit's holding, any state court wishing to head off this Court's scrutiny of a death sentence or conviction need do nothing more than invoke an insubstantial procedural default claim to close the federal courthouse door and to preempt this Court's role. In short, the Sixth Circuit fundamentally erred in holding that the federal constitutional rights of a prisoner facing death can be effectively nullified by reckless application of a state procedural rule that, even when properly applied, does not constitute a bar to federal review. The judgment accordingly should be reversed.[7]

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[7] The withholding of this exculpatory evidence until the second post-conviction proceeding also establishes ample "cause" for any alleged default (*Banks v. Dretke*, 540 U.S. 668, 692-93 (2004)), and given the "prejudice" flowing from this suppressed

II. Petitioner's *Brady* Claim Is Meritorious.

No court has ever fully considered, let alone ruled upon, the merits of petitioner's *Brady* claim. The state trial and federal district courts summarily dismissed the claim without holding an evidentiary hearing based on a series of procedurally undefended and indefensible rulings. *See supra* Part I. The Sixth Circuit, for its part, offered in dicta its view that the claim lacked merit (Pet. App. 25a, 59a-60a), but that was articulated only as an afterthought to that court's fundamentally flawed conception of the role of federal habeas courts and without the benefit of any evidentiary record being developed in the district court. Given the extraordinary procedural odyssey through which this case has wended, the many years that this case has ping-ponged between this Court and the Sixth Circuit, the State's constantly shifting

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evidence, petitioner cannot be denied federal review. Federal review is also not prohibited when the state courts have not "strictly or regularly" refused to address *Brady* claims based on withheld evidence first disclosed once the state courts construed state law to grant access to district attorneys' files. *See supra* at 33. To the contrary, the state courts have consistently addressed such claims on the merits. *See, e.g.*, *Workman v. State*, 868 S.W.2d 705 (Tenn. Crim. App. 1993) (addressing *Brady* claims in capital case decided on the merits following disclosure of district attorney files); *State v. Johnson*, No. 01C01-9610-CR-00442, 1997 WL 738586, at *3 (Tenn. Crim. App. Nov. 25, 1997) (deciding *Brady* claims on merits when capital petitioner "filed his second post-conviction petition in February 1995 after receiving information in 1992 pursuant to a request under the Tennessee Open Records Act"); *O'Guinn v. State*, No. 02C01-9510-CC-00302, 1997 WL 210890 (Tenn. Crim. App. Apr. 29, 1997) (remanding for hearing on the merits of *Brady* claim in capital case).

and constantly misguided arguments, and the facial substantiality of petitioner's *Brady* claim, basic principles of constitutional fairness, procedural efficiency, and the credibility of the judicial review process in capital cases require, at a minimum, that the case be remanded to the district court to conduct an evidentiary hearing into petitioner's *Brady* claim.

In *Brady v. Maryland*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). In *Strickler v. Greene*, 527 U.S. 263 (1999), this Court outlined the "three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 281-82.

In this case, the first two components of the *Brady* inquiry – that (i) evidence favorable to petitioner was (ii) suppressed by the state – are not disputed. The only question is whether the evidence was material or, at a minimum, whether petitioner has sufficiently alleged that the evidence was material either to his conviction or his sentencing, and thus its suppression prejudicial, as to warrant the conduct of an evidentiary hearing. In that regard, the question in determining the materiality of the evidence "is not whether the defendant would more likely than not have received a different verdict . . . but whether in its absence he received a fair trial,

understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Petitioner satisfies the *Brady* standard. His sole defense at trial and sentencing was that he lacked the mental state required for conviction of first-degree murder because he committed the crimes while suffering from a drug-induced psychosis, rooted in the post-traumatic stress disorder arising from his heroic military service in Vietnam. The State, for its part, tried the case and sought a death sentence under the theory that petitioner was a premeditated murderer and was not under the influence of drugs at the time of the killings. Because (i) the suppressed evidence bore directly on the critical dispute in the case and at sentencing, (ii) the evidence also directly undermined the State's theory of the case and the credibility of its witnesses, and (iii) one of the other aggravating circumstances on which the death sentence rests has already been ruled unconstitutional (665 S.W.2d at 95), the trial verdict is not worthy of confidence and, indeed, there is a substantial basis for concluding that the evidence would have swayed at least one juror to conclude either that petitioner lacked the required mens rea for first-degree murder or at the very least should not have been sentenced to death. Tenn. Code Ann. § 39-13-204 (1979) (requiring unanimity for death sentence).

A. The Suppressed Evidence Is Material Because It Bore Directly On Petitioner's Sole Defense And The Central Premise Of The Prosecution's Case Both At Trial And Sentencing.

1. The suppressed evidence bore directly on the central issue in the case both at trial and sentencing. Petitioner's only defense and argument in mitigation of the death penalty was that he lacked the required mental state for the charged crimes as a result of the combination of post-traumatic stress disorder and a drug-induced psychosis. His counsel explained to the jury that "there is only one issue in this entire lawsuit, and that issue is whether or not the acts of Gary Cone were the clear and deliberate and premeditated acts of an individual, whether that individual was sane under the law as His Honor will give it to you." Tr. 2040. And, the prosecution agreed that "[t]he question really is down to [whether Cone] was . . . criminally responsible for those actions." J.A. 110.

In support of this single defense, petitioner put on the testimony of two experts, who testified that post-traumatic stress disorder and a resulting extraordinary drug addiction had rendered petitioner psychotic and incapable of understanding the consequences of his actions. *See* J.A. 79-113; *see also infra* at 46. The State did not dispute that the drug use petitioners' experts attributed to him would have induced a psychotic condition. Nor did any witness for the prosecution directly testify as to whether petitioner was on drugs at the time he committed the crimes.

Instead, the prosecution's approach to defeating petitioner's defense was to attack the defense's central premise that petitioner was a drug user at all, describing that contention as "balon[e]y." J.A. 108. The prosecution used cross-examination to show that each defense expert's conclusion that petitioner had suffered from a psychosis rested on petitioner's description of his own drug use. *See, e.g.*, J.A. 106 (cross-examination of Lipman) ("Q. . . . . [I]s all of what you're saying based on what he told you? A. Yes, sir. Q. It's based on his statements to you, is it not? A. It is, yes."); Tr. 1689 (cross-examination of Jaremko) ("Q. This extent of drug usage that you have based your opinion on, then, is based on information from Mr. Cone and Dr. Lipman. . . . What someone else has told you. Isn't that about it? A. That's correct."). The prosecution also introduced the testimony of three fact witnesses which generally supported the State's position that petitioner was not a drug addict. Tr. 1872-83, 1955-57, 1981-83.

On that basis, the prosecution argued to the jury that petitioner was not, in fact, a drug addict, and thus that there was no foundation for his experts' conclusions that he was suffering from a psychosis at the time of the crimes. The experts, the prosecutor explained, "[j]ust took [petitioner's] word for it." J.A. 111. "I'm not trying to be absurd, but he says he's a drug addict. I say balon[e]y. He's a drug seller." J.A. 107. And as a drug dealer, rather than an addict, "[h]e wasn't drug crazy. He is a robber and a killer. Simple as that. Nothing complicated about this." J.A. 108. "No, you're not dealing with a crazy person, an insane man. A man, in their words, out of his mind. You're dealing, I submit to you, with a premeditated, cool, deliberate – and even cowardly,

really – murderer." J.A. 113. The Tennessee Supreme Court thus characterized petitioner's defense as "tenuous . . . at best," in light of the testimony of the State's witnesses and the limited evidence assembled by petitioner. *State v. Cone*, 665 S.W.2d 87, 90 (Tenn. 1984). The jury accepted the prosecution's argument, convicting petitioner of first-degree murder and sentencing him to death.

2. The suppressed evidence that is the subject of petitioner's *Brady* claim would have substantially corroborated petitioner's defense and defeated the foundation of the State's argument that petitioner was not a drug addict. For example, the police suppressed a statement taken from Robert McKinney, who witnessed petitioner rob a market the day before the jewelry store robbery. When asked whether petitioner "appear[ed] to be drunk or high on anything," McKinney responded: "Well, he did, he acted real weird; that is the reason I watched him." J.A. 49.

The State also suppressed a report documenting that Charles and Debbie Slaughter, who observed petitioner immediately after the jewelry store robbery, said petitioner "looked wild eyed." J.A. 50. And the prosecution withheld a report received from the Police Chief of petitioner's hometown informing the investigating officers that petitioner was "believed [to be] a heavy drug user" (J.A. 26), and a report from Sergeant Grieco, a Pompano Beach, Florida police officer involved in petitioner's arrest soon after the murders, describing petitioner as "agitated" and "looking about in a frenzied manner" (J.A. 53).

The suppressed evidence does not stop there. The prosecution also withheld other evidence that would have both bolstered petitioner's defense and permitted a blistering cross-examination of the prosecution's own witness, who sought to suggest that petitioner was neither a drug user nor under the influence at the time of the killings. This evidence, in turn, would have seriously undercut the testimony of prosecution expert, John Hutson, whose own testimony relied critically on statements from these prosecution witnesses (Tr. 1982) to opine that petitioner did not suffer mental illness at the time of the crimes or otherwise lack criminal culpability (Tr. 1983).

More specifically, while Memphis Police Sergeant Ralph Roby testified for the prosecution that petitioner did not appear to have needle marks on his body (Tr. 1939), the prosecution suppressed evidence that would have destroyed the impression left by his testimony that petitioner was not a drug addict, such as Roby's personal authorization of multiple official teletypes to other law enforcement agencies describing petitioner not only as a "DRUG USER" (J.A. 56-57) but a "HEAVY DRUG USER" (J.A. 55). The prosecution also withheld a statement Roby took from petitioner's sister, Sue Cone, who told Roby that petitioner had "severe psychological problems" and "need[ed] to work on the drugs" which were a "severe" problem. J.A. 59-60. Moreover, Roby himself had taken the statement of Robert McKinney, which, as noted above, described petitioner as being drunk or high when he robbed the store. J.A. 49.

Similarly, FBI Agent Flynn testified for the prosecution that, in an interview after petitioner's arrest, petitioner appeared to be under control, suggesting that he was not suffering from extreme drug withdrawal. Tr. 1923-24, 1937. Although the FBI participated actively in the investigation and prosecution of petitioner, the defense was not provided numerous FBI documents that would have seriously undercut Flynn's testimony. *See Kyles v. Whitley*, 514 U.S. 419, 428-29, 437 (1995) (stating that *Brady* applies to materials possessed by law enforcement agencies involved in investigation and prosecution). These documents reveal the FBI's own working understanding that petitioner was a drug addict. Like Roby, the FBI distributed seven official teletypes describing petitioner as a "BELIEVED HEAVY DRUG USER" and "DRUG USER." J.A. 62-68. At least one of the teletypes was entered into the National Crime Information Center, the official computerized index used by federal and state law enforcement agencies nationwide. J.A. 69. Various other suppressed FBI documents describe petitioner as a "DRUG USER." J.A. 71 (FBI statistics letter); C.A. J.A. 53 (FBI file coding).[8]

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[8] The FBI documents were not included in the district attorney's files, but instead were disclosed only at the district court's direction when petitioner filed his federal habeas petition. *See supra* at 13 n. 3. The district court and court of appeals correctly recognized that the FBI files are properly considered in evaluating petitioner's *Brady* claim if petitioner has demonstrated "cause and prejudice" for not raising them in the state courts. Because petitioner did not have access to the documents in state court and had no basis for surmising their existence, the relevant question is whether petitioner suffered

Finally, an acquaintance of petitioner, Ilene Blankman, testified for the prosecution that she did not believe that petitioner was on drugs when he was in her presence, and that once when she had seen petitioner disrobe, she did not see needle track marks on his body. Tr. 1875. Petitioner's counsel sought to impeach Blankman's testimony on the grounds that her employment by a sheriff's office gave her a strong incentive to cooperate with the prosecution (Tr. 1902), and that she had received unusual attention and treatment by being escorted from Florida to Tennessee for trial by a law enforcement agent (Tr. 1888).

Discovered in the prosecution's case file was additional evidence that would have more thoroughly undermined Blankman's credibility. For example, notes from a pre-trial interview with Blankman made no mention of the claim she made at trial that she had seen petitioner without clothes and noticed no track marks. J.A. 72-73. An FBI report also tellingly recounted that Blankman had been accused of lying at petitioner's trial, but had not responded to defend the truth of her testimony. J.A. 75. Additional correspondence in the district attorney's files suggested that the prosecution had been unusually solicitous of her testimony. J.A. 76-78.

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prejudice from the state court's failure to evaluate the materiality of that evidence. For the reasons given in the text, the evidence suppressed by the prosecution was material. Hence, petitioner was prejudiced. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004) (in evaluating *Brady* claim, "prejudice" and "materiality" inquiries are identical).

That direct and affirmative evidence that petitioner was both a well-known drug addict and under the influence of drugs when he committed the crimes went to the heart of petitioner's defense and resoundingly corroborated the testimony of his two expert witnesses. Dr. Matthew Jaremko, an expert on combat-related mental disorders and the only expert at trial on syndromes relating to the Vietnam War, diagnosed petitioner as suffering from a combination of two disorders: "One is a substance abuse disorder, but that is superimposed upon a post-traumatic stress disorder." J.A. 85. Dr. Jaremko testified that, in his view, petitioner "has continued to use drugs as a self-way [sic] to self-medicate against the stress that he feels from having been a victim of the combat trauma." J.A. 87. *See generally* J.A. 79-91 (expert testimony of Dr. Jaremko).

Dr. Jonathan Lipman, a neuro-pharmacologist and expert on substance abuse disorders, diagnosed petitioner as "suffering from severe symptoms . . . amphetamine psychosis" that would "prevent his knowing the wrongfulness of an act" and render him "substantially incapable of conforming his conduct to the requirements of law." J.A. 103-104; *see also id.* (condition constituted "a mental illness"). Dr. Lipman concluded that petitioner's use of "[f]righteningly large amounts [of drugs] for a long time" (J.A. 106) had produced "formication" hallucinations (J.A. 101-103) and "extreme paranoia" (J.A. 101); *see also* J.A. 97 ("I could not survive one of these amphetamine doses."); Tr. 1851 (petitioner suffered from "[t]he most profound symptoms" of acute amphetamine psychosis). *See generally* J.A. 92-106 (expert testimony of Dr. Lipman).

The suppression of such large amounts of strongly corroborating defense evidence, bearing both on his guilt and the appropriate sentence, was profoundly prejudicial to petitioner's defense. In fact, the prosecution's suppression of the evidence that would have validated petitioner's defense, and the prosecutors' patently false statements to the trial jury about petitioner's drug addiction and drug use, substantially undercut the premise of this Court's prior rulings in this case. The Court has twice sustained the constitutionality of the sentencing phase of petitioner's trial, expressing substantial confidence in the adversarial system of justice and the jury's ability to account for all the relevant facts and circumstances in determining whether to sentence petitioner to death. *See* 535 U.S. 685, 699-700 (2002) (petitioner did not receive constitutionally ineffective assistance of counsel at sentencing because his counsel made reasonable strategic judgments in light of the available evidence); 543 U.S. 447, 456-57 (2005) (per curiam) (petitioner's death sentence was valid because the state courts properly determined that the evidence before the jury satisfied a narrowed construction of an otherwise unconstitutionally vague aggravating circumstance). But petitioner's *Brady* claim demonstrates that, in reality, the jury did *not* have all the relevant facts before it, and the strategic decisions made by petitioner's counsel at sentencing actually rested on a seriously distorted assessment of the facts created by the State's outrageous suppression of all the evidence relevant to petitioner's defense.

The record thus establishes a *Brady* violation in and puts this case on all fours with *Kyles*, in which this Court held that *Brady* was violated when the

State suppressed witness statements that would have contradicted later testimony by eyewitnesses – testimony that was "the essence of the State's case" – and would have called physical evidence into question. *Kyles*, 514 U.S. at 441 (quoting decision below). As this Court explained, failing to provide such contradictory evidence was prejudicial because it would have "substantially reduced or destroyed" the value of the witnesses, (*id.* at 441) and "would have fueled a withering cross-examination" (*id.* at 443). "Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested." *Id.* at 429. The suppressed evidence thus "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (*id.* at 435), especially when one considers that creating reasonable doubt in just one juror would be sufficient to prevent a conviction or death sentence.[9]

B. The Court Of Appeals' *Brady* Analysis Was Fundamentally Flawed

Having washed its hands of any responsibility to review the state courts' invocation of a procedural

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[9] *See also Banks*, 540 U.S. at 699 (*Brady* violation established where disclosure of suppressed evidence "would have dampened the prosecutor's zeal" in arguments to jury; "the State could not have underscored, as it did three times in the penalty phase," that petitioner planned to use the murder weapon; and the suppressed evidence would have impeached testimony that "was the centerpiece of [the] prosecution's penalty-phase case").

default rule, the Sixth Circuit stated its view that the evidence suppressed by the prosecution was not material. That dictum was as wrong as the court's holding.

First, the court of appeals improperly evaluated the evidence piecemeal "as four separate *Brady* claims" (Pet. App. 18a), and considered "each category of [withheld] documents separately" (Pet. App. 57a). This Court has commanded exactly the opposite, holding that whether suppressed evidence is material must be determined by considering the evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436. *Cf. id.* at 440 (court of appeals erred where its opinion "contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone" of its ruling). That approach reflects the reality that the prejudicial impact of the suppression of exculpatory evidence, like other trial errors, must be assessed in the context of the trial record as a whole and, by the same token, the constitutional violation as a whole.

Second, the court's analysis of the evidence makes no sense even piece by piece. To begin with, it left out a lot of pieces. In its first opinion, the court discussed only one police report, which it deemed immaterial "because of the overwhelming evidence of Cone's guilt." Pet. App. 59a-60a. And then, even when its review became slightly more encompassing, the court of appeals inexplicably and inconsistently asserted that the jury had before it "persuasive testimony that Cone was *not* under the influence of drugs" when he committed the crimes (Pet. App. 25a (emphasis added)), and "had already heard

substantial evidence that he *was* a drug user" (Pet. App. 26a (emphasis added)).

Third, the court's focus on the "overwhelming evidence of Cone's guilt" (Pet. App. 59a-60a) makes no sense. The evidence of his guilt – in the sense that he committed the killings – was indeed overwhelming because it was uncontested by petitioner. If the court meant, instead, that the evidence at trial that Cone was not a drug user was overwhelming in comparison to the evidence that he was not, then the court simply gave dispositive effect to the very constitutional violations that created the skewed evidentiary record. Beyond that, given the substantial evidence in the prosecution file that, *by the government's own characterization*, petitioner was a drug user, any effort to characterize the record evidence including the suppressed material as overwhelmingly favorable to the prosecution would simply be wrong.

Fourth, any suggestion that the suppressed evidence was cumulative, that is, repetitive, lacks merit. That evidence provided the very direct evidence of petitioner's drug use and drug-induced condition that the prosecution had stated flatly to the jury was absent from his case, and supplied the very corroboration of petitioner's experts that the prosecution had claimed was fatally lacking. Indeed, petitioner's defense was left in tatters when the prosecution established that petitioner had no direct evidence of his drug use and addiction. Further, the trial testimony that the majority below deemed "persuasive" on the point that petitioner was not under the influence of drugs at the time of the crime (Pet. App. 25a) is the very testimony that would have been impeached had the prosecution disclosed the

teletypes issued by Sergeant Roby, the official FBI documents describing petitioner as a drug user, and the memoranda and records undercutting the credibility of Ilene Blankman. *See supra* at 42-45.

At the very least, the Sixth Circuit erred in denying petitioner the opportunity to have an evidentiary hearing in the district court to show that the prosecution's suppression of evidence undermines confidence in the trial verdict and death sentence. The district court erroneously dismissed the *Brady* claim as procedurally defaulted and, for that reason, never held an evidentiary hearing to assess the materiality of the evidence. That was error, and the court of appeals should have remanded the case to the district court rather than opine on the merits of an unexamined claim. When, as here, a state court has not addressed an issue, the State and state courts have demonstrated unprecedented inconsistency in attempting to avoid a claim, and the amount of suppressed evidence is substantial and aimed at the heart of the criminal case, a habeas petitioner is entitled to an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Teti v. Bender*, 507 F.3d 50, 61 (1st Cir. 2007) (collecting decisions concluding that *Keeney* "only modified *Townsend*'s six categories of mandatory hearings, leaving the rest of *Townsend* intact," and "the Advisory Committee Notes for Rule 8 of the Rules Governing § 2254 Cases, regarding evidentiary hearings, suggest that *Townsend* still applies except to the extent it is specifically superceded by § 2254(e)(2)"), *cert. denied sub nom. Teti v. Clarke*, 128 S. Ct. 1719 (2008). At the very least, the district court should have the opportunity to exercise its

judgment whether to hold a hearing in light of this Court's holding in *Kyles* that the materiality of suppressed evidence is to be determined cumulatively, not item-by-item. *Cf. Schriro v. Landrigan*, 127 S. Ct. 1933, 1940-44 (2007) (addressing circumstances in which district court appropriately exercises its discretion to hold evidentiary hearings). Though there is little question that petitioner's *Brady* claim is meritorious, this case can accordingly be properly resolved more narrowly by remanding the case to the district court for consideration of the merits of that *Brady* claim in the first instance.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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September 5, 2008

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
OCT 3 ; 2008
OFFICE OF THE CLERK

No. 07-1114

In The Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CAPITAL CASE
QUESTIONS PRESENTED

I.

Whether Cone's *Brady* claim is procedurally defaulted.

II.

Whether Cone's *Brady* claim is, in any event, without merit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 492 F.3d 743. (Pet. App. 6a) The memorandum opinion of the United States District Court for the Western District of Tennessee relevant to Cone's *Brady* claim is unreported. (Pet. App. 86a)

JURISDICTION

The judgment and opinion of the court of appeals were entered on June 19, 2007. (Pet. App. 6a) The court denied rehearing on September 26, 2007. (Pet. App. 1a) By order entered December 11, 2007, Justice Stevens extended the time for filing a petition for writ of certiorari from December 25, 2007, until February 23, 2008, a Saturday. Cone filed a petition for writ of certiorari on Monday, February 25, 2008. This Court granted the petition on June 23, 2008. Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(b) provides in pertinent part:

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

STATEMENT OF THE CASE

1. On August 10, 1980, Gary Cone forcibly entered the Memphis home of 93-year-old Shipley O. Todd and his 79-year-old wife, Cleopatra. When the Todds, in Cone's words, "ceased to cooperate" with him (R. 4, Add. 1, Doc. 1, Vol. 15, p. 1681),[1] Cone beat them both to death with a blunt object, probably a pistol. (R. 4, Add. 1, Doc. 1, Vol. 13, pp. 1293, 1295-96, 1298-1300) After moving their bodies to positions not visible from outside the house, Cone ransacked their

[1] References to the state-court record are denoted by citation to the addendum, volume, and page numbers set forth in respondent's Notice of Filing Documents, filed in the district court on February 13, 1997, and docketed as Record Entry 4. *Cone v. Bell*, No. 2:97-cv-2312 (W.D.Tenn.).

belongings in search of money, placed a long-distance call from their home telephone to his sister in Chicago, altered his appearance to avoid detection, and booked a flight to south Florida, where he was arrested four days later using the alias, Gerald Mason Harmon.

The brutal murders of the Todds were the climax of a crime spree that began on August 9, 1980, when Cone robbed a jewelry store in Memphis of approximately $112,000 in merchandise. The jewelry store manager gave a description of the suspect to police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery and pulled in behind him. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on foot. As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, pulled a gun on a third person, and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone attempted to fire his pistol several times, but the ammunition in the weapon was spent. *State v. Cone*, 665 S.W.2d 87, 90 (1984).

Cone managed to elude police on August 9th but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol and pointed it at her. Ms. Tuech quickly slammed the door, ran to another part of the house, and called the

police. *Id.* (R. 4, Add. 1, Doc. 1, Vol. 12, pp. 1207-08) Later that same afternoon, Cone broke into the home of the Todds, who lived a short distance from Ms. Tuech. The couple's bodies were found "horribly mutilated and cruelly beaten" three days later after authorities were alerted by anxious relatives. *Cone*, 665 S.W.2d at 90. Mr. Todd sustained 16 blows, mostly to the back of the head, and Mrs. Todd sustained 22 blows to the back and left side of the head; defensive wounds were present on the hands of both. Cone's fingerprints, palm prints, and hair were found in the Todds' home, which had been ransacked. He was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12. *Cone*, 665 S.W.2d at 90.

When police processed Cone's abandoned car, they recovered a large quantity of drugs and drug paraphernalia, including four bags of marijuana, 14 marijuana cigarettes, two marijuana cigarette butts, one pipe, and two bottles of marijuana seed, among other items. (R. 4, Add. 1 Vol. 14, p. 1505) In addition, police recovered a considerable amount of narcotic drugs, including five vials of Morphine Sulfate (one opened), four vials of Demerol Meperidine (½ full), two vials of Codeine S Phosphate, 13 vials of Leritine, five bottles of Dolophine Hydrochlorine containing a total of 465 tablets, two bottles of Percodan containing a total of 464 tablets, five bottles of Seconal Sodium containing a total of 469 tablets, five bottles of Nembutal Sodium containing a total of 500 tablets,

two bottles of Demerol containing a total of 182 tablets, four bottles of Tuinol containing a total of 402 tablets, four bottles of Amytal containing a total of 299 tablets, one bottle of Codeine Sulfate containing 55 tablets, eight bottles of Dexamyl containing a total of 462 capsules, 13 bottles of Dexedrine containing a total of 545 capsules, one bottle of Eskatrol containing 23 capsules, five bottles of Ritalin containing a total of 1126 tablets, one bottle of Benzedrine containing 102 tablets, one bottle of Coumadin containing one tablet, one bottle of Serpasil containing seven tablets, one box of Desoxyn containing 10 tablets, one box of Percocet containing one tablet, and one bottle of Preludin containing 50 tablets. Police also recovered assorted empty bottles and drug paraphernalia, six packs of insulin syringes and seven loose insulin syringes. (R. 4, Add. 1, Doc. 1, Vol. 14, p. 1505-09) At trial, the State theorized that Cone's possession of this quantity and variety of drug items – four bags of marijuana, 24 vials of four different narcotic drugs, and 5,163 tablets consisting of 18 different narcotics in 61 separate containers – demonstrated that he was a drug dealer, arguing in closing that Cone "had a drug store in [his] car." (R. 4, Add. 1 Vol. 18, p. 2016) Cone argued that he was addicted to drugs and, at the time of the murders, was simply a "junkie out of control." (R. 4, Add. 1, Doc. 1, Vol. 18, pp. 2060-62)

Although he admitted killing the Todds and committing the other crimes charged, Cone claimed that he was insane or lacked the requisite mental capacity to commit the offenses due to drug abuse

and stress arising out of his military service in Vietnam 11 years earlier. On direct appeal, the Tennessee Supreme Court found that the evidence "was overwhelmingly sufficient to sustain [Cone's] conviction on all charges." *Id.* at 91. Likewise, this Court noted that the State presented "near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings of two elderly persons in their home." *Bell v. Cone*, 535 U.S. 685, 699 (2002).

Cone presented the testimony of two expert witnesses to support his defense that he was insane at the time of the murders. Matthew Jaremko, a clinical psychologist, opined that Cone suffered from two interrelated disorders: a substance-abuse disorder and post-traumatic stress disorder. The substance-abuse disorder was caused primarily by post-traumatic stress disorder, which arose from Cone's exposure to combat trauma in Vietnam and his continuing trauma after returning home as a veteran of an unpopular war. (R. 4, Add. 1, Doc. 1, Vol. 15, p. 1670) According to Jaremko, Cone's post-traumatic stress disorder manifested itself over the years in the form of flashbacks, nightmares, depression, nervousness, and sleep disorders. (R. 4, Add. 1, Doc. 1, Vol. 15, pp. 1671-72) Dr. Jaremko testified that, in his opinion, Cone was suffering from a mental illness in August 1980, which rendered him incapable of conforming his conduct to the requirements of the law. He further testified that Cone had expressed remorse

for what had happened. (R. 4, Add. 1, Doc. 1, Vol. 15, pp. 1674-75)

Jonathan Lipman, a neuropharmacologist, testified that he had examined Cone and detailed his history of drug abuse. Dr. Lipman testified that Cone claimed to have had no history of drug abuse until the age of 18, when he was first exposed to hashish while serving in the Army in Germany. He was later introduced to opium and amphetamines while serving in Vietnam, where he said he was issued amphetamines for 53 consecutive nights to maintain alertness while on guard duty. (R. 4, Add. 1, Doc. 1, Vol. 16, p. 1724) According to Dr. Lipman, that pattern of amphetamine use continued throughout the rest of Cone's history. Dr. Lipman opined that in August 1980, Cone was suffering from chronic amphetamine psychosis, which prevented him from knowing the wrongfulness of his acts and rendered him substantially incapable of conforming his conduct to the requirements of the law. (R. 4, Add. 1, Doc. 1, Vol. 16, p. 1758)

In rebuttal, the State called Ilene Blankman, a resident of Key West, Florida, who had been acquainted with Cone between March and August 1980. She testified that she saw Cone in the early morning hours of August 12, 1980, two days after the murders in Tennessee. Blankman allowed Cone to stay at her apartment that night. The next day, Cone told Blankman that he had lost his wallet and needed to obtain another driver's license. She accompanied him while he obtained a voter registration card as

identification for a replacement license. Cone then studied for and passed the written and driving tests necessary to obtain a new driver's license. (R. 4, Add. 1, Doc. 1, Vol. 17, pp. 1880-82) Blankman did not observe any drug usage or aberrant behavior by Cone at that time. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1883)

FBI Agent Eugene Flynn interviewed Cone on August 14, 1980, at the Broward County Jail in Pompano Beach, Florida. Cone admitted shooting a police officer and robbing a jewelry store in Memphis but denied murdering the Todds. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1910-11, 1912, 1921) He stated that he could be positively identified by witnesses and by property he had abandoned in Memphis and stated that he had assumed the name "Harmon" to avoid detection. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1913, 1920-21) Cone indicated that, aside from drug withdrawal, he had no physical or mental problems, and he admitted using cocaine, dilaudid, and demerol. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1910-11, 1912, 1921) Cone discussed with Agent Flynn his educational background, including a college degree, and stated that he was about to enter law school. Agent Flynn testified that Cone was mentally alert, able to give details of his recent travels, and was aware of his surroundings. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1916-20)

Memphis police officer Ralph L. Roby saw Cone in Florida on two occasions following Cone's arrest. On August 18, 1980, it was necessary for Cone to completely disrobe while Roby took hair samples from

him. Roby observed no needle marks on Cone's body at that time. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1939)

Dr. Ben Bursten, a forensic psychiatrist, who examined Cone on January 20, 1982, found nothing to support a finding of post-traumatic stress syndrome. Nor did he find any evidence that, in August 1980, Cone had been suffering from any mental disease or defect or was unable to understand the wrongfulness of his acts or conform his behavior to the requirements of the law. (R. 4, Add. 1, Vol. 17, p. 1956-57) Likewise, Dr. John R. Hutson, a clinical psychologist who had examined Cone in January and February 1982, concluded that Cone was not suffering from a mental disease or defect and had the capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1983)

The jury rejected Cone's insanity defense and convicted him at the conclusion of the guilt phase of two counts of first degree murder, three counts of assault with intent to commit first degree murder and robbery by use of a deadly weapon. *Cone*, 665 S.W.2d at 89-90. A bifurcated sentencing hearing before the same jury followed.

The State established at the hearing that Cone had three prior convictions for robbery with a firearm, for offenses occurring on December 28, 1971, March 7, 1972, and May 22, 1972, for which he

received prison sentences of 25 years each.[2] (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2120-21, Vol. 21, Tr. Exh. 71) In addition, the State recalled at the sentencing hearing two Memphis police officers who had been involved in the initial efforts to apprehend Cone after the jewelry store robbery. Both officers testified that Cone evaded arrest. (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2128-32) Defense counsel presented no direct evidence in mitigation, but explained to the jury that it could rely upon mitigating evidence presented during the guilt phase of the trial. In addition, on cross-examination of the records custodian through whom proof of Cone's prior convictions was introduced, defense counsel elicited information suggesting that Cone had been awarded a Bronze Star for his military service in Germany and Vietnam and was honorably discharged from the United States Army in July 1969.[3] (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2123-24)

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[2] Cone was in prison for the Oklahoma robberies from 1972 to 1979. (R. 4, Add. 1, Doc. 1, Vol. 16, p. 1650)

[3] This information was derived from a notation contained in a Classification Summary from Oklahoma Department of Correction (ODOC) records, which stated that Cone had been awarded a Bronze Star for service in Vietnam and was honorably discharged from the United States Army in July 1969. (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2123-24) This was the first mention of a Bronze Star award at any point in Cone's trial despite the fact that the entire defense turned on his Vietnam experience. Neither defense counsel nor any witness at trial, including all four mental health experts who had questioned Cone about his military service in connection with his mental health defense, indicated that Cone had reported receiving any such award. At

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The jury returned verdicts of death for each of the two murders, finding that the State had proven four aggravating circumstances beyond a reasonable doubt: (1) that Cone was previously convicted of one or more felonies, other than the present charge, involving the use or threat of violence to the person; (2) that Cone knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder; (3) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. §§ 39-2-203(i)(2), (3), (5), and (6) (1975 & Supp. 1980). The jury further found no mitigating circumstances sufficiently substantial to outweigh those aggravating circumstances. (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2223, 2225) The Tennessee Supreme Court affirmed Cone's convictions and sentences on direct appeal (Pet. App. 84),[4] and this Court denied

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the post-conviction hearing, defense counsel testified that the award was not listed on Cone's military discharge document, Form DD 214. (R. 4, Add. 2, Doc. 1, Vol. 2, p. 101) The source of the ODOC record notation is unknown. However, a search of the online database maintained for public access by the U.S. National Archives and Records Administration does not show that Cone ever received any such award. *See* U.S. National Archives, Access to Archival Databases, URL: http://aad.archives.gov/aad/index.jsp.

[4] The Tennessee Supreme Court found that the aggravating circumstance under Tenn. Code Ann. § 39-2-203(i)(3) (risk of

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certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984). Cone raised no claim in his direct appeal that prosecutors withheld exculpatory evidence, and the Tennessee state courts did not address that issue.

2. Cone initiated his first state post-conviction proceeding in June 1984. He asserted nine grounds for relief, including ineffective assistance of counsel, prosecutorial misconduct related to allegedly improper argument at the guilt stage of trial, sufficiency of the evidence of guilt, instructional error at sentencing, and various challenges to Tennessee's death penalty statute and procedures. The trial court denied relief following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed. He did not raise any claim that prosecutors withheld exculpatory evidence, and the Tennessee state courts did not address the issue. (R. 4, Add. 2, Doc. 1, Vol. I, pp. 27-29, 42-54, 105-10) *Cone v. State*, 747 S.W.2d 353 (Tenn. Crim. App.), *cert. denied*, 488 U.S. 871 (1988).

Cone filed a second petition for post-conviction relief in June 1989, asserting multiple grounds of ineffective assistance of counsel, instructional error at the sentencing stage of trial, prosecutorial misconduct

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death to two or more persons) was inapplicable to an extended criminal episode, such as the one here. But because the jury clearly found three other aggravators, the Court found that any error with respect to the (i)(3) circumstance was harmless beyond a reasonable doubt. *Cone*, 665 S.W.2d at 95. (Pet. App. 98-99)

related to allegedly improper argument at the guilt stage of trial, trial court error, and various challenges to Tennessee's death penalty statute and procedures. (R. 4, Add. 3, Doc. 1, pp. 26-35) The trial court summarily dismissed the case without appointment of counsel after finding that all of the claims raised had been previously litigated or were waived by Cone's failure to raise them in his first post-conviction proceeding. However, the Tennessee Court of Criminal Appeals reversed, holding that a remand was necessary to provide Cone an opportunity to overcome the presumption of waiver arising from the previous proceedings.[5] *Cone v. State*, No. 48, 1991 WL 77535 (Tenn. Crim. App. 1991) (perm. app. denied Aug. 24, 1992).

On remand, the trial court appointed post-conviction counsel, who filed an amended petition on August 13, 1993. (R. 4, Add. 4, Doc. 1, p. 64) In his amendment, Cone asserted 23 grounds for relief, including a claim of ineffective assistance of counsel with 34 sub-parts, 15 separate challenges to guilt-phase jury instructions, 8 challenges to sentencing-phase jury instructions, 18 instances of trial court error, and 15 separate challenges to Tennessee's

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[5] Tenn. Code Ann. § 40-30-112(b)(2) (1990) created a rebuttable presumption of waiver as to a ground for relief raised in a second or subsequent post-conviction petition where the petitioner failed to present it for determination in any proceeding before a court of competent jurisdiction in which it could have been presented.

death penalty statute. Among this litany of claims, Cone asserted the following generalized *Brady* claim:

> 35. The State violated petitioner's rights under Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7, 8, 9 and 16 of the Tennessee Constitution by failing to provide petitioner material exculpatory evidence including *evidence concerning absence of forced entry which negated burglary, concerning contradictory statements made by eyewitnesses, and any and all information concerning State witness Ilene Blankman* which demonstrated that she received consideration for her testimony and/or testified falsely concerning facts related to petitioner and his drug use.

(R. 4, Add. 4, Doc. 1, p. 81) (emphasis added) (J.A. 13-14)

As cause for failing to raise his claims earlier, Cone included in his petition a catch-all paragraph encompassing all 90 of his allegations:

> 39. The above claims were not raised previously either due to the law regarding the claim not being established at the time, ineffective assistance of counsel, the novelty of the claim, or counsel's failure to apprise petitioner of the claim or its relevance to the case. Because of this, the petitioner himself has never had an opportunity before now to either raise these claims or waive them. Neither petitioner nor any person previously appointed to represent petitioner has

> knowingly and understandingly failed to raise any and all such claims earlier.

(R. 4, Add. 4, Doc. 1, p. 81)

In response, the State first argued that "[m]any of Petitioner's claims have been previously determined on appeal of the trial." The State then attempted to parse the numerous claims and sub-parts of Cone's amendment to identify those claims decided in the previous two proceedings. As to paragraph 35, the State argued that it "appears to be the same as that found on page 94 of [Cone's direct] appeal." (R. 4, Add. 4, Doc. 1, p. 108-09) (J.A. 15-16) On October 15, 1993, Cone filed another amendment to his post-conviction petition. Picking up at paragraph 41, Cone added 11 new claims, including:

> 41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 6, 7, 8, 9, 10, 11, 14, 16 and 17 of the Tennessee Constitution, because the State withheld exculpatory evidence which demonstrated that *petitioner did in fact suffer drug problems and/or drug withhdrawal or psychosis both at the time of the offense and in the past*, such evidence including, but not limited to, *statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins,* and other persons unknown at this time, such statement contained in official police reports, and/or contained in other

> documents unknown and/or through personal recollections of officers or others. Such evidence was highly exculpatory and exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted petitioner and would not have sentenced him to death.

(R. 4, Add. 4, Doc. 1, p. 139) (emphasis added) (J.A. 20-21)

As cause for failing to present the additional claims earlier, Cone contended that the absence of funding for expert witnesses in his first post-conviction proceeding had denied him the opportunity to present the claims at that time. (R. 4, Add. 4, Doc. 1, pp. 143-44)

On October 15, 1993, Cone submitted a reply to the State's response to "clarify any possible confusion" concerning why he had not waived the claims submitted for the first time in his second post-conviction proceeding. (R. 4, Add. 4, Doc. 1, pp. 146-52) In it, he advanced three general reasons for failing to raise his new claims earlier: (1) inadequate consultation and communication and ineffective assistance of previous post-conviction counsel; (2) inability to fully investigate and/or develop the facts underlying any claims not purely legal in nature because of his lack of access to the full record of the case due to Cone's incarceration and indigent status; and (3) lack of legal knowledge and acumen necessary to properly and fully

raise his claims previously because Cone is not an attorney. (R. 4, Add. 4, Doc. 1, pp. 150-51) He did not assert that the documents supporting his *Brady* claim had only become available during his second post-conviction proceeding.

On November 12, 1993, Cone filed yet another amendment to his petition, arguing at length that he had not *personally* made a knowing and understanding waiver of any of the claims asserted in his second post-conviction proceeding. There, Cone argued again that the claims were not waived "because, *inter alia*, he was unaware of such claims in earlier proceedings, due either to the unavailability of the factual predicate of such claims, had no knowledge of the legal standards governing his case, and/or the failure to be apprised of the significance, and because he had no understanding that failure to raise such claims would constitute a waiver." (R. 4, Add. 4, Doc. 1, p. 170) On December 10, 1993, Cone submitted a 41-page affidavit on the waiver question. Two paragraphs out of the 71-paragraph affidavit referenced the paragraph numbers corresponding to Cone's *Brady* claim. As to paragraph 35, he stated:

> ¶ 35. I did not know the existence of this claim in earlier proceedings, including post-conviction proceedings. During those proceedings, I did not know the facts or legal significance of any facts concerning Ilene Blankman and the State's duty to provide exculpatory evidence, nor did either trial or appellate or post-conviction counsel after full

investigation and full disclosure discuss the significance of such matters with me and the significance or viability of this claim. Being incarcerated, indigent, and without the benefit of the record in this matter, I also had no ability to investigate or develop facts relevant to such claim. Had I known the facts underlying such claim, the legal significance of such fact, and the governing law, I would have presented such claim in earlier proceedings. Had I understood that I needed to raise this claim in earlier proceedings, I would have done so, had I known about this claim. I have never made a deliberate, informed, considered, tactical choice not to present this claim earlier. I have not knowingly or understandingly or intelligently or deliberately failed to present this claim in earlier proceedings.

(R. 4, Add. 4, Doc. 1, pp. 205-06)

As to paragraph 41, he stated:

¶ 41. I did not know of the existence of this claim in earlier proceedings, including post-conviction proceedings. During those proceedings, I did not know the facts nor the legal significance of any facts concerning the State's withholding of evidence, nor did either trial or appellate or post-conviction counsel after full investigation and full disclosure discuss the significance of such matters with me and the significance or viability of this claim. Being incarcerated, indigent, and without the benefit of the record in this

> matter, I also had no ability to investigate or develop facts relevant to such claim. Such facts have been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding. I have never seen those files. Had I known the facts underlying such claim, the legal significance of such facts, and the governing law, I would have presented such claim in earlier proceedings. Had I understood that I needed to raise this claim in earlier proceedings, I would have done so, had I known about this claim. I have never made a deliberate, informed, considered, tactical choice not to present this claim earlier. I have not knowingly or understandingly or intelligently or deliberately failed to present this claim in earlier proceedings.

(R. 4, Add. 4, Doc. 1, pp. 206-07) (J.A. 17-18)

On December 16, 1993, the trial court entered judgment denying relief and dismissing Cone's petition. (R. 4, Add. 4, Doc. 1, p. 217) After reciting the procedural history of the case, the trial court declined to review the merits of any of the grounds raised in Cone's petition, citing the Tennessee statutory provision barring consideration of grounds for relief that have been waived or previously determined. (R. 4, Add. 4, Doc. 1, p. 219) As to paragraph 35, the trial court stated that "[g]rounds 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 involve[ ] a potpourri of errors by the court at the trial all of which grounds have been considered and denied

in direct appeal or the first Post Conviction Petition." (*Id.*, p. 219) As to paragraph 41, the trial court ruled:

> Petitioner, by way of his Third Amendment, continues with grounds 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52 all of which grounds are clearly re-statements of grounds heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition.

(*Id.*, p. 223) (J.A. 22) The trial court's most detailed analysis involved its rejection of Cone's waiver argument set forth in paragraph 39 of the amended petition:

> [Cone's] explanation to rebut the presumption of waiver under T.C.A. 40-30-112(2) fails as a matter of law to state a reason why [he] should not be held to have waived any ground or grounds, if any there be, not previously presented or could have been presented on direct appeal or by the First Petition for Post Conviction Relief.

(*Id.*, p. 221)

On appeal to the Tennessee Court of Criminal Appeals, Cone argued that the trial court erred by failing to hold an evidentiary hearing on the issue of waiver, particularly in view of his December 1993 affidavit, which he contended showed "there was no knowing and understanding waiver of the claims advanced in the successive petition for post-conviction relief." (R. 4, Add. 4, Doc. 3, pp. 12-13) Cone challenged the trial court's finding that certain claims

had been previously determined, in particular, the new elements of his ineffective assistance of counsel claim and his claim that the trial court's jury charge violated the burden-shifting prohibition addressed in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Cone did not identify the *Brady* claim as an issue of any particular note or present any specific argument regarding the substance of that claim; he did not challenge the trial court's ruling on grounds that the items comprising his *Brady* claim had only become available to him after his first post-conviction proceeding had concluded. In fact, Cone's only mention of the claim in his principal brief before the Tennessee Court of Criminal Appeals came in a passing reference to paragraph number 35 (among 18 others) within a quotation from the trial court's order. (*Id.*, pp. 15-16) Cone's reply brief asserted, without further elaboration, that his claims of ineffective assistance of counsel and withholding of exculpatory evidence "ha[d] not been waived" and warranted an evidentiary hearing. (R. 4, Add. 4, Doc. 4, p. 5)

The Tennessee Court of Criminal Appeals declined to address the merits of any of Cone's claims, affirming the trial court's determination that "all of the issues raised by the appellant's amended second petition were either previously determined or waived." *Cone v. State*, 927 S.W.2d 579, 580 (Tenn. Crim. App.), *cert. denied*, 519 U.S. 934 (1996). Not surprisingly, the state appellate court's opinion did not address the *Brady* claim, focusing instead on Cone's failure to overcome the presumption of waiver as to those claims raised for the first time in the

second post-conviction proceeding. After addressing each of Cone's arguments, the court of criminal appeals concluded that he had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined," and affirmed the judgment of the trial court. *Cone*, 927 S.W.2d at 582.

3. Cone sought federal habeas relief in July 1997, asserting numerous grounds, including a claim that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), set forth in paragraph 39(a)-(k) of his petition. (R. 71, pp. 12-17) (J.A. 24-30) The district court denied Cone's petition for writ of habeas corpus, finding in pertinent part that Cone had procedurally defaulted those claims raised for the first time in his second petition for post-conviction relief. As to Cone's *Brady* claim, the district court specifically addressed each item cited by Cone and concluded, alternatively, that they were either procedurally defaulted or meritless. (Pet. App. 112a-119a)

On March 22, 2001, a unanimous panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment with respect to Cone's *Brady* claim, concluding, "[W]e believe that Cone's [*Brady*] claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. *And even if that were not so, we are satisfied that the documents Cone complains were withheld were not* Brady *material.*" *Cone v. Bell*, 243 F.3d 961, 968 (6th Cir. 2001) (emphasis added). However, the Sixth Circuit reversed and remanded

the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences due to ineffective assistance of counsel at sentencing. *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). This Court granted Warden Bell's petition for writ of certiorari and, on May 28, 2002, reversed the decision of the Sixth Circuit, and remanded the case for further proceedings consistent with its opinion. *Bell v. Cone*, 535 U.S. 685 (2002) (*Cone I*). Cone did not petition this Court for review of the Sixth Circuit's 2001 determination of the *Brady* claim, although it was then ripe for review.

On remand, the Sixth Circuit again reversed the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences, this time finding that the trial court's instructions to Cone's jury on the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague. *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004). Again, this Court reversed and remanded the case with instructions for "further proceedings consistent with [its] opinion." *Bell v. Cone*, 543 U.S. 447, 460 (2005) (per curiam) (*Cone II*).

In 2005, after this Court's second remand, Cone sought to revive his original *Brady* claim, arguing that *Banks v. Dretke*, 540 U.S. 668 (2004), established the "exceptional circumstances" necessary to avoid application of the law-of-the-case doctrine that would ordinarily have precluded reconsideration of the 2001 decision rejecting the *Brady* claim. The Sixth Circuit refused to revisit its earlier decision, however, concluding that "[w]e do not find any such [exceptional]

circumstance" in this case. *Cone*, 492 F.3d at 755. (Pet. App. 23a) The court further noted that, "[e]ven if we were disposed to ignore our prior decision on this issue," Cone's *Brady* claim is without merit:

> We said this before in *Cone*, 243 F.3d at 968-70, and we now say it again. A review of the allegedly withheld documents shows that this evidence would not have overcome the overwhelming evidence of Cone's guilt in committing a brutal double murder and the persuasive testimony that Cone was not under the influence of drugs. . . . It would not have been news to the jurors that Cone was a "drug user." They had already heard substantial direct evidence that he was a drug user, including the opinion of two expert witnesses, the testimony of Cone's mother, drugs found in Cone's car, and photographic evidence. Despite this evidence, the jurors concluded that Cone's prior drug use did not vitiate his specific intent to murder his victims and did not mitigate his culpability sufficient to avoid the death sentence. In short, the allegedly withheld evidence catalogued by the dissent does not "undermine confidence in the verdict because there is [not] a reasonable probability that there would have been a different result had the evidence been disclosed," . . . and so we reject Cone's *Brady* claims.

(Pet. App. 25a-26a)

SUMMARY OF THE ARGUMENT

The Sixth Circuit correctly found that Cone procedurally defaulted his *Brady* claim because the state courts declined to review the merits on state procedural grounds. Cone presented a *Brady* claim for the first time in his second state post-conviction proceeding. Under Tennessee law, there is a rebuttable presumption that a ground for relief not raised in prior post-conviction proceedings or on direct appeal is waived. The post-conviction court dismissed Cone's *Brady* claim on the erroneous ground that it had been "considered and denied" on direct appeal or in the first post-conviction proceeding. On appeal, however, the Tennessee Court of Criminal Appeals affirmed the lower court's judgment after concluding that Cone had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." *Cone*, 927 S.W.2d at 582. It did not otherwise address the lower court's finding as to the *Brady* claim. The record plainly shows that Cone did not present his *Brady* claim on direct appeal or in his first post-conviction proceeding, nor did the state courts adjudicate the merits of the claim in either of those proceedings. Thus, Cone's contention that a claim that has been "previously determined" by the state courts cannot be procedurally defaulted in federal habeas is inapposite on this record. The state appellate court's waiver determination encompasses Cone's *Brady* claim and substantiates the Sixth Circuit's finding of default.

Cone's alternate effort to challenge the *correctness* of the state court's waiver determination comes too late. He could have and should have directed his concerns to the state appellate court but failed to do so. To reject a state court's judgment as erroneous for reasons never presented to the state court in the first place is contrary to the notions of comity and federalism that drive federal habeas jurisprudence, and this Court should decline Cone's invitation that it do so in this case. The Court should also make clear that the adequacy of a state procedural bar for purposes of procedural default in federal habeas proceedings does not equate to an assessment of its correctness in a particular case. A federal habeas court does not sit as a super appeals court in matters of state law and may not reject an otherwise adequate state procedural bar based upon its view that the state court applied it erroneously in a particular case.

The Sixth Circuit's holding that the evidence in question is, in any event, immaterial under *Brady v. Maryland*, 373 U.S. 83 (1963), independently justifies affirmance of the judgment below. To justify relief under *Brady*, the allegedly withheld evidence must place the "whole case" in a different light. *Kyles v. Whitley*, 514 U.S. 419, 425 (1995). The evidence on which Cone relies – consisting primarily of hearsay contained in police teletypes issued during a police search for Cone after he had evaded capture following a foiled robbery of a jewelry store and references to unspecified "psychological problems" – says nothing about his mental state at the time of the

murders and does not impeach the testimony of any of the numerous witnesses who observed him during the relevant period. The jury heard substantial evidence of Cone's drug use, and the defense presented two mental health experts to substantiate his mental health defense. The fact that witnesses described Cone as "wild-eyed" while he was fleeing police after the jewelry heist and the commission of two separate shootings reveals nothing that would have materially advanced his defense. Nor does any of the evidence in question impeach the testimony of state witnesses describing Cone's demeanor and appearance in the days after the murders. The prosecution destroyed Cone's defense at trial not by showing that Cone was not a drug addict, but by pointing to the most compelling evidence of Cone's mental state – his own words and actions in the period surrounding the murders, a fact emphasized by the prosecutor in closing argument: "Look at the facts of what Mr. Cone did on Saturday and Sunday to go to his mental attitude. He wasn't drug crazy. He is a robber and a killer. Simple as that." (R. 4, Add. 1, Vol. 18, pp. 2023-24) None of the evidence Cone now contends is exculpatory materially undermines that evidence. The significance of the evidence on which Cone relies is overblown and does not approach the level of materiality required for *Brady* purposes. The Sixth Circuit's judgment should be affirmed.

ARGUMENT

I. CONE'S *BRADY* CLAIM IS PROCEDURALLY DEFAULTED.

Cone argues that the Sixth Circuit erred in holding his *Brady* claim to be procedurally defaulted after it had been "twice presented" to the state courts. This is so, he contends, because the state court's application of a bar to re-litigation shows that the petitioner, in fact, gave the state courts a *second* opportunity to right the alleged wrong and thus could not have defaulted the claim. (Pet. Br. 23-29) Cone's argument is sophistry. The record plainly shows, and Cone himself admits, that he did *not* "twice present" his *Brady* claim to the state courts. (Pet. Br. 29) Cone presented a *Brady* claim to the state courts for the first time in a second or subsequent petition for post-conviction relief. But the state courts rejected the claim on procedural grounds, concluding that a merits review was barred under state law. The state court's judgment rested on state law grounds that were both independent of federal law and adequate to sustain the judgment. Under these circumstances, the Sixth Circuit correctly concluded that Cone procedurally defaulted his *Brady* claim: "The independent and adequate state ground in this instance is the state court's finding that Cone's claims were previously determined *or* waived under Tenn. Code Ann. § 40-30-112 (1990)." *Cone*, 243 F.3d at 969 (emphasis added). (Pet. App. 59a) And, because Cone cannot meet the cause-and-prejudice showing necessary to avoid the default, the court was correct in

affirming the judgment of the district court dismissing his petition for a writ of habeas corpus.

A. The state appellate court refused to review the merits of Cone's *Brady* claim, presented for the first time in his second post-conviction petition, on the basis of a state statutory procedural bar.

A habeas petitioner is required to exhaust state remedies by presenting the substance of his constitutional claim to the state courts prior to seeking federal habeas relief. 28 U.S.C. § 2254(b). The exhaustion doctrine is grounded in principles of comity and federalism and is designed to ensure that the States have the first opportunity to correct alleged violations of a prisoner's federal rights. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To that end, a habeas petitioner must fairly present his claims in each appropriate state court for consideration before seeking federal relief. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Duncan v. Henry*, 513 U.S. 365, 365 (1995). Exhaustion principles also require that a petitioner comply with the State's procedural requirements for presenting his federal claims. *Coleman*, 501 U.S. at 732.

In general, a federal court may not consider an issue of federal law arising from a judgment of a state court "if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the [state] court's

decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). Although the doctrine originated in the direct-review context, it also extends to federal habeas corpus proceedings to bar review when a state court declines to address a petitioner's claims because he failed to meet a state procedural requirement. *Coleman*, 501 U.S. at 729-30; *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977). When Cone presented a *Brady* claim for the first time in his second post-conviction proceeding, the state court denied relief on the basis of a state procedural ground. The post-conviction court declined to address the merits of any of the claims raised in that proceeding after finding that "the grounds stated in the Petition as amended have been either previously determined or presumptively waived as a matter of law." (R. 4, Add. 3, Doc. 1, p. 232) The post-conviction court also specifically held that Cone had failed to overcome the statutory presumption of waiver as to those claims raised for the first time in Cone's second post-conviction proceeding. (*Id.* at 234) On appeal, the Tennessee Court of Criminal Appeals affirmed the post-conviction court's judgment, holding that Cone "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." *Cone*, 927 S.W.2d at 582. The Tennessee Court of Criminal Appeals, the last state court rendering an opinion on Cone's federal claims, thus applied a state procedural bar as to all of the claims raised in that action, including the *Brady* claim, that precluded federal habeas review. *See, e.g., Coleman*, 501 U.S. at 739.

The state appellate court's opinion is properly read as applying the procedural bar of waiver as to all claims raised for the first time in Cone's second post-conviction petition, including the *Brady* claim.[6] While it is true that the state post-conviction trial court erroneously listed the *Brady* claim among those "considered and denied" on direct appeal or in the first post-conviction action (R. 4, Add. 3, Doc. 1, pp. 234, 236), the state appellate court's opinion does not embrace, or even address, that incorrect finding. Indeed, because the state appellate court concluded that Cone had failed to overcome the statutory presumption of waiver as to any and all new claims, there was simply no need for the court to distinguish between claims that had been raised and rejected in prior proceedings and those raised for the first time in the second post-conviction petition.[7] Both categories of claims were procedurally barred and thus had

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[6] Tenn. Code Ann. § 40-30-112(b) (1990) provides:

> (1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

[7] "A ground for relief is 'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (1990).

properly been dismissed by the lower court.[8] The waiver bar erected by the state appellate court extended to "all claims in [Cone's] second petition for post-conviction relief which had not been previously determined." *Cone*, 927 S.W.2d at 582. Cone's *Brady* claim unquestionably falls within that class of claims.[9]

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[8] The scope of any hearing under Tennessee's Post-Conviction Procedure Act "shall extend to all grounds that petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined, as herein defined." Tenn. Code Ann. § 40-30-111 (1990).

[9] Because it is beyond dispute that Cone never presented a *Brady* claim to the state courts until he filed his second post-conviction petition, as amended, Cone's reliance upon footnote 3 of this Court's opinion in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), is unavailing (indeed, it is mystifying). In *Ylst*, the Court presumed that a later state court order rejecting a prisoner's federal claim without explanation in fact rested on the application of a state-law procedural bar, because the last reasoned state-court judgment in the case had expressly rejected the claim on the basis of such a bar. *Ylst*, 501 U.S. at 805-06. In footnote 3, the Court distinguished the situation where an unexplained state-court order in fact rests upon a prohibition against further merits review of a claim already considered and rejected by the state courts. In that circumstance, the Court reasoned, a federal habeas court is not precluded from reviewing the claim; instead, it may "look through" the latter, unexplained order, to the earlier merits determination contained in the last reasoned state-court judgment deciding the claim. *Ylst*'s footnote 3 obviously has no application to Cone's case. Cone raised his *Brady* claim for the first time in his second post-conviction petition; the last reasoned state-court judgment in the case expressly rejects all claims raised for the first time in the second petition on the basis of the state procedural bar of waiver; and,

(Continued on following page)

Cone argues in this Court that his *Brady* claim, in fact, was properly before the post-conviction court, *i.e.*, that the state court's application of the procedural bar was erroneous. He contends that the allegedly exculpatory materials in question were not reasonably available to him until after his first post-conviction proceeding, at which time he first gained access to the district attorney's case file. (Pet. Br. 29-30) These assertions are misdirected and come too late. Cone had an opportunity to address this very argument to the state courts to overcome the statutory presumption of waiver but failed to do so during his second post-conviction proceeding. The various amendments to his second post-conviction petition make no mention of the availability of the district attorney's case file. In fact, Cone's haphazard pleadings in the post-conviction court point virtually everywhere but there. *See id.* at 14-19. The sole reference in Cone's filings in the post-conviction trial court regarding the district attorney's case file came in a single sentence buried in a 41-page affidavit submitted in December 1993. But Cone did not press that point in his appeal to the Tennessee Court of Criminal Appeals. In fact, he presented no argument or authority in that court at all regarding a *Brady* claim, let alone explain the genesis of that claim in

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accordingly, even if a federal habeas court were to "look through" that judgment in search of an earlier state-court merits disposition of the *Brady* claim, there is nothing on the other side to find, because Cone had never raised such a claim at any earlier stage of the case.

order to overcome the post-conviction court's judgment.[10] The rules of the Tennessee Court of Criminal Appeals require that issues raised in that court be supported by argument, citation to authorities and appropriate references to the record. Tenn. R. Crim. App. 10(b). It is not obligated to search for needles in a haystack, particularly on a point not even pressed before it.[11] *Cf. Smith v. Duncan*, 411 F.3d 340, 345 (2d Cir. 2005) (appellate court has no obligation to "look

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[10] By contrast, Cone presented extensive argument in the Tennessee Court of Criminal Appeals on his ineffective assistance of counsel and *Sandstrom* claims. *See id.* at 20-21. Cone's failure to assert his claim in the Tennessee appellate courts reveals yet another reason to uphold the Sixth Circuit's default determination. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (state prisoners must give state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's appellate review process). *Cf. Baldwin*, 541 U.S. at 32 (a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a brief or other document that does not alert it to the presence of a federal claim in order to find material that does).

[11] Cone first articulated an argument regarding the waiver of his *Brady* claim in his Application for Permission to Appeal to the Tennessee Supreme Court under Tenn. R. App. P. 11, which provides for a discretionary appeal from a final decision of the Tennessee Court of Appeals or Court of Criminal Appeals. (R. 4, Add. 4, Doc. 8) Failure to raise or brief an issue before the trial court or intermediate appellate court is ground for waiver of review in the Tennessee Supreme Court. *Alexander v. Armontrout*, 24 S.W.3d 267, 273 n.9 (Tenn. 2000). *See also* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

for a needle in a paper haystack"); *Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) (the exhaustion requirement demands that a state prisoner do more than "scatter some makeshift needles in the haystack of the state court record"). Cone invites this Court to ignore the judgment of the state court for reasons that were never presented to that court in the first place, a result that flies in the face of all notions of comity and federalism.

B. The state procedural ground both independently and adequately supports the state court's judgment.

Cone argues that this Court is obligated to determine whether a procedural bar was "correctly" applied by a state court. (Pet. Br. 31) He is mistaken. It is true that a federal court may conduct an independent assessment of "when and how defaults in compliance with state procedural rules can preclude [a federal court's] consideration of a federal question." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). Indeed, a federal court must ascertain for itself "whether the asserted non-federal ground independently and adequately supports the judgment." *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). But, given the interests of comity and federalism, the Court has generally upheld a procedural ground as adequate where the defendant has notice of the rule, *i.e.*, the procedure is firmly established and regularly followed, and the State has a legitimate interest in its enforcement. For example, in *Henry*, the Court

considered the question of the adequacy of a state procedural ground to bar review by the Court on direct appeal, concluding that the failure to comply with a state contemporaneous-objection rule as to the admission of evidence did not necessarily bar federal review of the underlying Fourth Amendment claim. The state procedural rule would be "adequate" where "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry,* 379 U.S. at 446. Because the purposes of the rule in *Henry* were largely served by another procedural avenue, the Court concluded that enforcement of the contemporaneous-objection rule was less essential and thus inadequate to deprive the Court of jurisdiction on direct review. *See also Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state procedural bar inadequate where it had not been "consistently or regularly applied" in the past); *James v. Kentucky*, 466 U.S. 341, 346 (1984) (state procedural rule disregarded by federal court where the rule "not always clear or closely hewn to"); *Wolfe v. North Carolina*, 364 U.S. 177, 196 (1960) (appeal dismissed for lack of jurisdiction where state supreme court declined to decide federal question because of state procedural rules that were "clearly delineated and even-handedly applied"); *Staub v. Baxley*, 355 U.S. 313, 320 (1958) (state procedural bar inadequate where its application would force "an arid ritual of meaningless form" and its strict application was contrary to a "long line" of Georgia rulings). The Court has also refused to give effect to a state court's application of a procedural rule when its application is "exorbitant" and the

State's interests are otherwise substantially met, *Lee v. Kemna*, 534 U.S. 362, 376, 387 (2002), where a defendant was not fairly apprised of the rule's existence, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958), and where the state procedure imposes "unnecessary burdens" on a litigant's federal rights. *Brown v. Western Railway Co.*, 338 U.S. 294, 298 (1949). None of these conditions is present in this case.

Nevertheless, Cone urges this Court to enter new territory – to reject an otherwise adequate state procedural bar because its application by the state court was allegedly erroneous under the particular circumstances of a case. In *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944), the Court stated that it will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court especially where there is "fair support" for the non-federal basis for the decision and "no evasion of the constitutional issue" by a state court. By contrast, Cone would have this Court directly oversee a state's application of its own procedures governing the presentation of a federal claim, a clear departure from precedent and one that is contrary to the principles of federalism underlying the Court's habeas corpus jurisprudence. The rule Cone advances would, in fact, impose greater federal court scrutiny over a state court's application of its own procedural rules than is permitted under the habeas statute for review of a merits determination of

a constitutional claim. 28 U.S.C. § 2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("[A] federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established law erroneously or incorrectly."). And it would serve no legitimate purpose given the procedural safety valve already in place that permits federal review of procedurally defaulted claims where a prisoner can show cause for his state-court default and actual prejudice from the alleged federal-law violation or that the failure to review the claim would result in a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478 (1986); *Schlup v. Delo*, 513 U.S. 298 (1995).

Procedural rules are just as much a product of State sovereignty as the substantive laws they implement. *Lee*, 534 U.S. at 395 (Kennedy, J., dissenting). Cone's proposed rule tramples the significant State interests served by those rules and the state-court oversight he seeks disrespects the State's legitimate efforts to enforce them.

The state court's application of a procedural bar in Cone's case reflects the longstanding requirement under Tennessee law that a petitioner must present constitutional claims at the earliest possible opportunity. Tennessee's Post-Conviction Procedure Act, enacted in 1967, is a comprehensive scheme for litigating alleged constitutional violations. Under the Act:

> Relief shall be granted when the conviction is void or voidable because of the abridgement

> in any way of any right guaranteed by the constitution of this state or the Constitution of the United States including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

Tenn. Code Ann. § 40-30-105 (1990).

The scope of any hearing under the Act extends to all grounds the petitioner may have, except those grounds which the state court finds should be excluded because they have been "waived or previously determined." Tenn. Code Ann. § 40-30-111 (1990). There is a rebuttable presumption that a ground for relief not raised in prior proceedings under the Act or on direct appeal is waived. Tenn. Code Ann. § 40-30-112 (1990). The waiver provision was added in 1971 with the aim of codifying the judicial construction already in place and to underscore the significant state interest in the finality of criminal judgments, which is severely eroded by delayed and/or piecemeal litigation. *House v. State*, 911 S.W.2d 705, 709-10, 713-14 (Tenn. 1995) (citing *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system")). The burden is on the petitioner to overcome the statutory presumption of waiver. *Id.* By placing the burden on a petitioner to demonstrate why his claim is properly before the post-conviction court, the law balances the State's interests in the finality of its criminal judgments with the rights of a defendant to a reasonable opportunity to assert his federal rights.

The Tennessee Court of Criminal Appeals initially reversed and remanded the post-conviction court's summary dismissal of Cone's uncounseled successive post-conviction petition because he had not been given an opportunity to rebut the presumption of waiver. *Cone*, No. 48, 1991 WL 77535, at *1. *See id.* at 12-13. Thus, Cone was unquestionably on notice of this procedural requirement. And, because Cone made no effort in the Tennessee Court of Criminal Appeals to overcome the presumption of waiver he knew existed as to his *Brady* claim or even to alert that court to the substance of his claim, *see id.* at 20-21, the procedural bar constitutes an adequate basis to support the state-court judgment.

C. Cone cannot demonstrate cause for the default and actual prejudice resulting from the state court's refusal to review the merits of the *Brady* claim.

Cone's state-court default would not leave him without recourse in the federal courts if he could show cause and prejudice. An adequate and independent finding of default will bar federal habeas review of a federal claim unless the habeas petitioner can show cause for the default and actual prejudice as a result of the alleged violation of federal law. *Coleman*, 501 U.S. at 750. However, the Sixth Circuit found in 2001 that Cone had "further defaulted" by failing to advance any argument before that court on the cause-and-prejudice question. *Cone*, 243 F.3d at

971. In his most recent journey to that court, Cone argued that this Court's decision in *Banks* excused any state-court default and justified reconsideration of the 2001 decision. *Cone*, 492 F.3d at 753-54. The Sixth Circuit correctly rejected Cone's argument, reiterating its earlier determination that Cone's *Brady* claim was, in any event, meritless. The cause-and-prejudice question is not fairly included in either of the questions accepted for review in this Court, both of which focus on the narrow question of the preclusive effect of the state court's procedural determination; it is thus outside the scope of the issues that may be addressed in this Court. *See* Sup. Ct. R. 14.1 (a) ("Only questions set forth in the petition, or fairly included therein, will be considered by the Court."). In any event, because the prejudice component necessary to avoid a procedural default coincides with the materiality element of *Brady,* the Sixth Circuit's merits determination, as we now show, properly disposed of both questions. *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (Unless suppressed evidence is "material for *Brady* purposes, [its] suppression [does] not give rise to sufficient prejudice to overcome [a] procedural default."); *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (same).

II. CONE'S *BRADY* CLAIM, EVEN IF NOT DEFAULTED, IS WITHOUT MERIT.

The 2001 and 2007 opinions of the Sixth Circuit plainly demonstrate that the court of appeals' decision did not rest solely on procedural default grounds.

Rather, in *both* instances, the court expressly rejected Cone's claim on the merits, concluding that the documents in question were not material for *Brady* purposes and thus provided no basis for relief regardless of whether Cone had fairly presented the claim during his state post-conviction proceeding. (Pet. App. 17a-26a, 56a-64a) On this point, Cone persists in the view that the Sixth Circuit's merits determination was mere *dicta*. However, to the extent the language employed in the 2001 opinion raised questions about the court's intent, all doubt was surely resolved in 2007, with the court's pointed reference to its "alternative holding" in 2001 and its explicit rejection of Cone's *Brady* claim. *Cone*, 492 F.3d at 753, 757. The court's alternative merits finding was appropriate under 28 U.S.C. § 2254(b)(2), which empowers a federal court to deny a writ of habeas corpus on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. *See Bell v. Cone*, 543 U.S. 447, 451 n.3 (2005) (addressing merits of claim notwithstanding question concerning procedural default).

To establish a *Brady* violation, a petitioner must prove that: (1) the evidence was favorable to the accused either because it is exculpatory or because it is impeaching; (2) the prosecution suppressed the evidence; and (3) the evidence was material to either guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor is not required to deliver his entire file to defense counsel or even to disclose all

evidence favorable to the accused "no matter how insignificant," *United States v. Bagley*, 473 U.S. 667, 676 (1985). A new trial is not automatically required whenever "a combing of the prosecution's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)). Instead, a constitutional violation occurs only when the omission "deprived the defendant of a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Evidence is material for *Brady* purposes when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Cone argues that the evidence in question supported his contention at trial that he was a drug user and was acting under the influence of drugs at the time of the murders. However, given the overwhelming evidence of guilt, the materials in question would have done nothing to undermine the State's case or even credibly impeach any of the witnesses at trial. It is true that Cone offered a "single defense" that, at the time of the murders, he was acting under a drug-induced psychosis that prevented him from forming the requisite mens rea for first-degree murder, but the evidence in question does not materially advance that defense. On its face, the evidence says nothing about Cone's mental state at the time of the crime and does not impeach the testimony of any of the

numerous witnesses who observed Cone in the period surrounding the murders.

Moreover, none of the information contained in the materials in question was particularly revelatory. The jury heard substantial evidence of Cone's drug use, including the testimony of two expert witnesses and his mother. Dr. Jonathan Lipman outlined for the jury, in detail, the information Cone had reported to him concerning his drug habits and patterns, including Cone's statements that he had multiple daily amphetamine injections. (R. 4, Add. 1, Doc. 1, Vol. 16, pp. 1729-37) The proof at trial showed that, at the time of the offense, Cone was in possession of a significant variety and quantity of narcotics and other controlled substances. *See id.* at 4-5. There was unrebutted testimony at trial that Cone's drug use began while he was serving in the Army, first in Germany, then in Vietnam, where he claimed to have been issued amphetamines for 53 consecutive nights to maintain his alertness while on guard duty. FBI Agent Flynn recounted Cone's admission that he used cocaine, dilaudid, and demerol, as well as Cone's assertion that he was suffering from drug withdrawal on August 14, 1980, four days after the murders. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1915)

Two expert witnesses testified in support of Cone's mental health defense. The first, Dr. Matthew Jaremko, testified that Cone suffered from a substance-abuse disorder and post-traumatic stress disorder, which rendered him incapable of conforming his conduct to the requirements of the law. (R. 4, Add.

1, Doc. 1, Vol. 15, pp. 1670, 1674-75) Dr. Lipman testified that Cone suffered from chronic amphetamine psychosis, which prevented him from knowing the wrongfulness of his acts and rendered him incapable of conforming his conduct to the requirements of the law in August 1980. (R. 4, Add. 1, Doc. 1, Vol. 16, p. 1758)

Cone argues that multiple law enforcement teletypes issued while Cone was at large after evading arrest for the jewelry store robbery, which described the suspect of that robbery as a "heavy drug user," substantially corroborated Cone's defense and seriously undercut the testimony of state witnesses. (Pet. Br. 42-44) However, given the overwhelming evidence of guilt at trial, the materials in question would have done little, if anything, to reinforce Cone's defense. The jury knew that police had recovered a huge quantity of drugs and drug paraphernalia from Cone's abandoned car. *See id.* at 4-5. They had heard the testimony of Dr. Lipman concerning Cone's alleged drug use as well as Cone's mother, Valeree Cone, who testified that Cone had "changed" after his military discharge and that he had received a package of marijuana shipped from Vietnam. (R. 4, Add. 1, Doc. 1, Vol. 15, pp. 1634-44, 1647) Fugitive reports provided to law enforcement agencies across the country that were issued during the search for Cone after he had evaded capture – describing him both as a drug user and "armed and dangerous" – reveal little more than cautious police work in the course of a rapidly unfolding and obviously very dangerous

situation and would hardly be surprising to the jury, given that the advisories were issued *before* Cone's arrest on August 14, 1980. The fact that witnesses described Cone as "wild-eyed" while he was fleeing police likewise reveals nothing that would have materially advanced his defense – he was being hotly pursued by multiple law enforcement officers in patrol cars, on foot, and by helicopter after a foiled jewelry heist and the commission of two separate shootings. Who, in that circumstance, would appear serene?

None of these items, individually or collectively, materially undermines the State's case or materially advances Cone's defense. Contrary to Cone's contentions, the evidence in no way impeaches the testimony of Sergeant Ralph Roby that he observed no needle marks on Cone's body when he saw him on August 18, 1980. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1939-40) In fact, to the extent there may have been any question on that point, the jury had for themselves a photograph of Cone and Sergeant Roby that was taken at that time. (R. 4. Add. 1, Doc. 1, Vol. 14, pp. 1515-16, Vol. 21, Exh. 63)

The testimony of FBI Agent Flynn, which concerned his observations of Cone's demeanor when he observed him on August 14, 1980, is also unscathed. His testimony that Cone was mentally alert, provided details of his recent travels, and exhibited no signs of a mental disease or defect is in no way inconsistent with any of the FBI alerts Cone now insists were "exculpatory." Moreover, Agent Flynn never testified

that Cone was not a drug user; to the contrary, he recounted for the jury Cone's admission that he used cocaine, dilaudid, and demerol. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1916)

Cone's arguments regarding Ilene Blankman are even more farfetched. He contends that documents showing that she "received unusual attention and treatment" by law enforcement officers – by being escorted by law enforcement from Florida to Tennessee for trial – and that the prosecution was "unusually solicitous" of her testimony would have undermined her credibility at trial. (Pet. Br. 45) But defense counsel specifically cross-examined Blankman about allegedly inconsistent or incomplete prior statements, including the absence in her previous statement to police that she observed no needle marks. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1903) The jury also knew, through defense counsel cross-examination, that Blankman had been escorted to the Tennessee trial by a law enforcement officer.[12] (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1906) Neither Roby, Flynn, nor Blankman testified that Cone was not a drug user; rather, each of the witnesses confined their testimony to their observations of Cone in the days after the murders, during which time they did not observe him use drugs, and he did not appear to be under the influence.

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[12] Indeed, contrary to Cone's assertions here, review of defense counsel's cross-examination calls into question the suggestion that the materials at issue were withheld at all.

Cone's contentions about the significance of the evidence he catalogues is overblown and devoid of merit. Even if the jury had had additional, independent evidence of Cone's drug use, his own words and actions defeated his claim of insanity, a fact emphasized by the prosecutor in closing argument: "Look at the facts of what Mr. Cone did on Saturday and Sunday to go to his mental attitude. He wasn't drug crazy. He is a robber and a killer. Simple as that." (R. 4, Add. 1, Doc. 1, Vol. 18, pp. 2023-24) The jewelry store robbery involved careful planning. The day before the robbery, Cone stole a Tennessee license plate. (R. 4, Add. 1, Doc. 1, Vol. 13, pp. 1350-51; Vol. 14, pp. 1496-97) He cased the store under the ruse of shopping for an engagement ring, so that he could identify a case containing high-priced jewelry, requesting of the store manager to see a particular size and shape of diamond, as well as a particular, very expensive watch, and speaking knowledgeably with the manager about diamonds before displaying his weapon. (R. 4, Add. 1, Doc. 1, Vol. 11, pp. 973-75) In the course of the robbery, Cone had the presence of mind to tell one of the store customers, "Don't worry, I'm not about to panic over this." (R. 4, Add. 1, Doc. 1, Vol. 11, p. 1014, 1017) He changed his clothing after the robbery to avoid detection. (R. 4, Add. 1, Doc. 1, Vol. 14, pp. 1496-97, 1501)

After evading police, Cone again displayed command of his behavior and mental faculties when he attempted to gain entry into the home of Lucille Tuech, a neighbor of the Todds. Again, he employed a calculated ruse when he asked Mrs. Tuech if "the

Manleys" lived in the building and then asked to use her telephone. When she refused his request, Cone brandished a pistol. But Mrs. Tuech quickly slammed the door in his face, ran to another part of the house, and called the police. (R. 4, Add. 1, Doc. 1, Vol. 12, pp. 1206-08)

After brutally murdering the helpless, elderly Todds – not because he was out of his mind, but, by Cone's own admission, because they "ceased to cooperate" with him (R. 4, Add. 1, Doc. 1, Vol. 15, p. 1681) – Cone moved their bodies to positions in the house not visible from the outside, callously rummaged through the Todds' belongings looking for money, altered his appearance by shaving his beard, and booked a flight to Key West, Florida, where he assumed the alias "Gerald Mason Harmon" to avoid detection. Within days of the murders, Cone studied for and took written and driving tests to obtain a replacement driver's license under the Harmon alias. FBI Agent Flynn described him at that time as mentally alert, able to give details of his recent travels, and aware of his surroundings. Two mental health experts testified at trial that Cone was not suffering from any mental disease or defect and had the capacity to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct.

In short, the evidence Cone claims was withheld in no way undermines the jury's verdict. It impeaches no witness and proves nothing. To justify relief under *Brady*, the evidence in question must place the "whole case" in a different light. *Kyles,* 514 U.S. at

435. The evidence here comes nowhere near meeting that standard. The Sixth Circuit correctly rejected Cone's *Brady* claim, and its holding independently justifies affirmance of the judgment below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

113 (12) No. 07-1114

Supreme Court, U.S.
FILED
DEC 1 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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December 1, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR THE PETITIONER

Petitioner's sole defense to the capital murder charges against him was that he was in the throes of an amphetamine psychosis, brought on by post-traumatic stress disorder from his honorable service in Vietnam and by his massive addiction to drugs. Petitioner maintained on that basis that he was insane or, at the least, deserving of the mercy of a life sentence rather than the death penalty. The prosecution not only suppressed significant evidence that validated petitioner's defense, but it also misled the jury by arguing that petitioner's claim of drug addiction was a fabrication; presenting its own witnesses to disprove that defense; and suppressing further evidence that would have impeached its witnesses. The State subsequently thwarted any adjudication of petitioner's claim that the prosecution's conduct violated *Brady v. Maryland*, 373 U.S. 83 (1963), by repeatedly misrepresenting the case's procedural history to the state and federal courts. Petitioner's opening brief demonstrated that he is finally entitled to a single adjudication of his *Brady* claim, and moreover that the claim is meritorious. Respondent's arguments to the contrary are not persuasive.

I. Petitioner Has Not Procedurally Defaulted His *Brady* Claim.

Respondent does not defend the Sixth Circuit's ruling that petitioner's *Brady* claim was "procedurally defaulted" in light of the state courts' holding that the claim had been "previously determined." Respondent instead advances two new

theories for deeming the claim defaulted. Those arguments, however, have been waived and are in any event meritless for multiple reasons.

A. Respondent Does Not Defend The Sixth Circuit's Obviously Erroneous Holding That The "Previous Determination" Of A Claim Establishes A "Procedural Default."

After petitioner was convicted and sentenced to death, he timely sought state post-conviction relief. His first application did not include his *Brady* claim because state law as it then stood did not grant him access to the prosecution files that contained the exculpatory evidence the State had suppressed. When an intervening state court ruling forced the prosecution to finally reveal that evidence (*see Capital Case Res. Ctr. v. Woodall*, No. 01-A-01-9104-CH-00150, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992)), petitioner promptly set forth the *Brady* claim in his second amended post-conviction application. Respondent notably does not dispute that this application was authorized under state law. *See* Pet. Br. 5-7 & n.1, 36-37 n.7 (collecting Tennessee decisions authorizing successive applications in these circumstances); J.A. 13-14 (¶ 35), 19-21 (¶ 41); *Swanson v. State*, 749 S.W.2d 731, 733-34 (Tenn. 1988) (applying Tenn. Code § 40-30-112 (repealed 1995)).

In the state post-conviction proceedings, however, the State falsely represented to the trial court that petitioner's suppression claim had been previously determined on direct review, with the consequence that the claim was not justiciable as a

matter of state law. Pet. Br. 5-7; J.A. 16-17; Resp. Br. 15. When petitioner subsequently presented his *Brady* claim on federal habeas, respondent reversed course, falsely representing to the Sixth Circuit that the claim was "simply never raised in the state court" (J.A. 41) – precisely the opposite of the State's previous misrepresentation that petitioner had presented the claim twice in state court.

The Sixth Circuit held that petitioner's *Brady* claim was procedurally defaulted based on the state trial court's determination that the claim had been "previously determined":

> Under Tennessee law, grounds for relief which have been "waived or previously determined" are not cognizable in a state post-conviction application. The Tennessee courts held that Cone's *Brady* claims were previously determined under this rule and we found that Cone's claims were therefore procedurally defaulted.

Pet. App. 22a (citations omitted).

Respondent does not defend that holding. He nonetheless asserts that petitioner's arguments for reversal of the Sixth Circuit's judgment are not merely "sophistry" (Br. 28) but affirmatively "mystifying" (*id.* at 32 n.9) because "Cone himself admits[] that he did not 'twice present' his *Brady* claim to the state courts" and instead "presented [the claim] for the first time in a second or subsequent petition for post-conviction relief" (*id.* at 28 (emphasis and citations omitted)). Admits? By misrepresenting the record, the State persuaded the state courts in 1993 that the claim *was* previously determined. Petitioner has spent the ensuing fifteen years

attempting to establish that the state courts' error should not preclude him from ever receiving a single adjudication of his *Brady* claim.

Petitioner's opening brief demonstrated that the Sixth Circuit erred because (a) his *Brady* claim was not previously determined but rather was presented only once – in his second post-conviction application (Br. Part I.B), and in any event (b) such a finding by the state courts would not establish that the claim was "procedurally defaulted" as a matter of federal law because it would merely mean that petitioner had twice exhausted his claim in state court (*id.* Part I.A). Before this Court, respondent disputes neither point and finally acknowledges after more than a decade of litigation that petitioner's *Brady* claim was not "previously determined." Br. 25. Because a patently erroneous and undefended state court finding that a federal constitutional claim has been defaulted will not preclude that claim's consideration on federal habeas corpus (*see* Pet. Br. Part I.B), the Sixth Circuit's judgment should be reversed.

B. Respondent's Newfound Theories That Petitioner Improperly Briefed His *Brady* Claim In State Court Are Both Wrong And Irrelevant.

Nothing if not consistent in his inconsistency, respondent now advances two entirely new theories – at least his sixth and seventh – for depriving petitioner of even a single adjudication of his claim under *Brady*. *See generally* Pet. Br. 15-16 (detailing the first five). Having acknowledged that petitioner complied with the substance of Tennessee law on the permissibility of successive post-conviction

applications, respondent now turns his attention to the process by which petitioner's state post-conviction counsel briefed his *Brady* claim in state court. Citing a "presumption of waiver," respondent asserts that petitioner should have done a better job of explaining to the trial court that petitioner could not have included his *Brady* claim in his first post-conviction application because the facts underlying the claim became available only later. Br. 39. Respondent also asserts that petitioner should have presented a more detailed argument to the state court of criminal appeals that his *Brady* claim was not waived. *Id.*

Both of respondent's newfound theories lack merit for four independent reasons: (i) respondent has waived these arguments by not raising them earlier in the case; (ii) neither of his theories can be the basis for a finding of procedural default because neither was the basis for the state courts' dismissal of the *Brady* claim; (iii) petitioner in fact properly presented the claim to the state courts; and (iv) in any event, petitioner has shown "cause and prejudice" for any supposed failure to timely present the claim in the state system.

1. Respondent has waived both of the procedural default arguments he makes in this Court. Over the course of the fifteen years of post-conviction proceedings in this case, the parties have addressed petitioner's *Brady* claim in the state post-conviction court, the Tennessee court of criminal appeals, the federal district court, the Sixth Circuit (twice), and at the certiorari stage in this Court. But prior to the submission of his brief on the merits, respondent had never before made either argument as a basis for deeming petitioner's *Brady* claim procedurally

defaulted. This Court "do[es] not consider claims that were neither raised nor addressed below" absent "only the most exceptional circumstances." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004).

Nothing would be gained – and this Court's limited resources would be wasted – by deciding this case on the basis of respondent's new fact-bound, state law theories. This Court granted certiorari to resolve conflicts in the circuits over the effect under federal law of a state court ruling that a defendant's federal constitutional claim had been "previously determined." *See* Pet. for Cert. 13-17. But respondent now asks this Court to leave those important questions unresolved in order to instead decide in the first instance whether isolated sentences in a trial court affidavit and appellate brief filed in the state courts more than a decade ago fail to satisfy Tennessee's pleading standards. Such a ruling would establish only one principle of federal law that would guide later cases: that a party is free to repeatedly misrepresent the record through multiple rounds of litigation in state and federal court, only to attempt to rescue a concededly erroneous ruling in its favor through entirely new arguments at the last possible minute.

2. In any event, neither of respondent's new theories can give rise to a finding of procedural default because neither was the basis of the state courts' rulings. Only a state law ground clearly invoked by the state courts establishes a default precluding a federal habeas court from considering a federal constitutional claim. *See, e.g.*, *Harris v. Reed*, 489 U.S. 255, 261-62 (1989) (for procedural bar to

apply, the "state court must actually have relied on the procedural bar as an independent basis for its disposition of the case" (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985))).

Respondent's arguments cannot survive a straightforward reading of the state courts' rulings. Respondent himself recognizes the unambiguous treatment of the *Brady* claim in the state post-conviction courts: the trial court "dismissed Cone's *Brady* claim on the erroneous ground that it had been 'considered and denied' on direct appeal or in the first post-conviction proceeding" (Resp. Br. 25) and, in turn, "the state appellate court's opinion [affirming the trial court] did not address the *Brady* claim" (*id.* 21). *See* J.A. 22 (dismissal of ¶ 41); Reply App., *infra*, 1a (dismissal of ¶ 35)); Reply App., *infra*, 4a-11a (appellate opinion). The state supreme court then denied review without comment. *Cone v. State*, CCA No. 02C01-9403-CR-00052 (Tenn. Mar. 4, 1996).

The state trial court's specific and unambiguous dismissal of the *Brady* claim on the ground that it had been previously decided (J.A. 22) is controlling for purposes of assessing the state courts' finding of procedural default. The trial court's opinion is determinative as the last reasoned decision on the question, given that neither the court of criminal appeals nor the state supreme court spoke to the issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) (holding that opinions which are silent on an issue are construed to affirm the lower court's holding and thus "a presumption which gives them no effect – [and] simply 'looks through' them to the last reasoned decision – most nearly reflects the role they are . . . intended to play").

Respondent's contention that the state court of criminal appeals held that petitioner failed to overcome a state law "presumption of waiver" applicable to the *Brady* claim in his second post-conviction application (Br. 21) misstates that court's ruling. To the extent that court said anything relevant, it "affirmed" the trial court's ruling, including its holding that "most of [petitioner's] stated grounds for relief . . . were previously determined." Reply App., *infra*, 5a, 11a. Respondent's reliance on the appellate court's statement that petitioner waived "'all claims raised in [his] second petition for post-conviction relief which *had not* been previously determined'" (Resp. Br. 25 (quoting Reply App., *infra*, 11a) (emphasis added)) thus misses the mark because the trial court held that the *Brady* claim *was* previously determined, and the court of criminal appeals did disturb that ruling. *Accord* Br. of *Amici* Former Prosecutors 9 n.3. At the very least, the state court of criminal appeals' ruling does not contain the "clearly expressed" finding of waiver (*Harris v. Reed*, 489 U.S. at 263) that would be required to establish that petitioner procedurally defaulted his *Brady* claim.

3. Respondent's newfound theories of procedural default fail for the further independent reason that petitioner properly presented and preserved his *Brady* claim at every turn in the state system.

a. Respondent does not dispute that petitioner presented the claim at the first possible opportunity, and that the claim was timely filed under state law. *See supra* at 2. Petitioner also properly advised the trial court of the justification for his second post-

conviction application. Petitioner submitted a sworn affidavit explaining: "I did not know of the existence of this claim in earlier proceedings, including post-conviction proceedings. . . . Such facts have been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding." (J.A. 17-18 (¶ 41). The affidavit carefully tracked the parallel paragraph of the second amended post-conviction application. *Compare* J.A. 17-18 *with* J.A. 20-21. Petitioner also requested an evidentiary hearing to prove that he had not waived his claims. Reply App., *infra*, 2a-3a.

Petitioner's submissions fully satisfied the mandates of Tennessee law, and the state courts notably did not hold to the contrary. State law merely required petitioner to "briefly and clearly state . . . whether [the claim] ha[d] been previously presented to any court and, if not, why not." Tenn. Code § 40-30-104(a)(10) (repealed 1995). Because the facts underlying petitioner's *Brady* claim were not available at the time his first post-conviction application was decided, the claim was not subject to a presumption of waiver. *Swanson v. State*, 749 S.W.2d 731, 734 (Tenn. 1988) ("A rebuttable presumption of waiver arises if the asserted grounds for relief could have been but were not presented in any prior proceedings at the first reasonable opportunity."). The State was entitled to dismissal of the *Brady* claim without petitioner receiving the benefit of the evidentiary hearing he requested on the question of waiver only if it had negated petitioner's representation that he could not have previously asserted the claim. *Allen v. State*, 854 S.W.2d 873, 874-75 (Tenn. 1993) (when a petition "present[s]

reasons why the claims were not presented [earlier] . . . 'the State's conclusory contention in the trial court that Petitioner has filed a prior petition cannot be the sole grounds to justify a dismissal when the claim presented is that the ground did not exist at the time of the prior petition, unless this claim is conclusively incorrect'" (quoting *Swanson*, 749 S.W.2d at 736)). Because the State did not even *attempt* to dispute petitioner's justification for presenting the claim in his second application, there could be no finding of waiver.

After the trial court nonetheless erroneously dismissed petitioner's application without holding an evidentiary hearing, he continued to press the claim in the court of criminal appeals. Petitioner argued that, contrary to the trial court's ruling, "a close examination of the issues resolved in the direct appeal and the decision in his first post-conviction appeal, clearly shows that the issues were neither presented on direct appeal nor addressed in the initial post-conviction petition." Br. for Appellant, *Cone v. State*, No. 02C01-9403-CR-00052, at 16 (citations omitted). That discussion referenced his *Brady* claim. *Id.* at 15-16 (referencing ¶ 35 of second amended post-conviction application). Petitioner also specifically argued that "a hearing is essential in order to enable Mr. Cone to present evidence and prove the factual allegations, including those relating to his claims . . . of the *withholding of exculpatory evidence*." Reply Br. for Appellant, *id.*, at 5 (emphasis added) (citing J.A. 17-18 (¶ 41)). *See also* Br. for Appellant, *id.*, at 6 (explaining that in the trial court petitioner "moved for the disclosure of exculpatory evidence for the post-conviction

proceeding"); *id.* at 16-17 (relying on trial court affidavit identifying State's failure to disclose exculpatory evidence).

b. Respondent nonetheless argues that, because this case is now in federal court, it is "too late" for petitioner to respond to allegations that his counsel presented the *Brady* claim in state courts in an improper manner. Br. 26. Respondent specifically asserts that petitioner was required to argue in the state court of criminal appeals that he did not waive the claim by raising it in his second post-conviction application. *Id.* at 34 n.10. But respondent ignores that petitioner argued to the court of criminal appeals that his affidavit established that he had not waived any of his claims. Br. for Appellant, *Cone v. State*, No. 02C01-9403-CR-00052, at 12-13, 18.

Petitioner had no reason – much less any obligation – to present a more developed argument to the state court of criminal appeals that he had not waived his *Brady* claim in particular. Petitioner was appealing the trial court's ruling, which rested on the theory of "previous determination," not "waiver." *See supra* at 7. Nor did the State argue that the dismissal of the *Brady* claim should be upheld on the theory of "waiver." Indeed, there was no serious argument that petitioner had waived the claim under state law, given that he presented the *Brady* claim as soon as the prosecutors were compelled by state law to turn over the files they had suppressed at trial. *See supra* at 2. Petitioner was not required to anticipate that respondent would argue fifteen years later in this Court that the state court of criminal appeals could have erroneously deemed the claim to have been waived.

In any event, even assuming that the court of criminal appeals did *sua sponte* deem petitioner's *Brady* claim to have been "waived," petitioner nonetheless properly preserved his objection to that ruling at the first possible opportunity. As respondent acknowledges, after the state court of criminal appeals ruled, petitioner addressed any alleged "waiver of his *Brady* claim in his Application for Permission to Appeal to the Tennessee Supreme Court." Resp. Br. 34 n.11. There is accordingly no sound basis for respondent's assertion that petitioner abandoned the *Brady* claim by failing to argue it with sufficient detail in the Tennessee appellate system.

4. Finally, given that respondent seemingly acknowledges that any finding of waiver by the state courts would have been erroneous, petitioner is at the very least entitled to show that he has not waived his claim as a matter of federal law under the "cause and prejudice" standard. *See Williams v. Taylor*, 529 U.S. 420 (2000); *Strickler v. Greene*, 527 U.S. 263 (1999); *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Indeed, respondent recognizes that his position is premised on establishing that petitioner "cannot meet the cause-and-prejudice showing necessary to avoid the [alleged] default." Br. 28.

Respondent does not doubt that petitioner had "cause" for not presenting his *Brady* claim in his first post-conviction application because at that time the evidence substantiating his claim of suppression was still being suppressed. *See* Pet. Br. 5; *Strickler*, 527 U.S. at 283. As respondent recognizes, the remaining question whether petitioner has established prejudice

"coincides with the materiality element of *Brady*" (Resp. Br. 41; *see Banks v. Dretke*, 540 U.S. 668, 691 (2004)) – *i.e.*, if petitioner's *Brady* claim is meritorious, petitioner has been "prejudiced" by the failure of the state courts to decide it. Thus, even on respondent's alternative theory for affirming the Sixth Circuit's judgment, the determination whether petitioner procedurally defaulted his *Brady* claim requires an evaluation of the materiality of the State's suppression: if the claim is found to have merit, then petitioner has established "prejudice" and is entitled, as a matter of federal law, to review of his meritorious *Brady* claim. *See also* Pet. Br. 8, 44-46 (petitioner established cause and prejudice with respect to withheld FBI documents).

II. Petitioner's *Brady* Claim Is Meritorious.

Petitioner's opening brief demonstrated that the prosecution in this case engaged in gross misconduct in responding to petitioner's only defense and argument in mitigation of the death penalty: that he committed the crimes in the course of an amphetamine psychosis brought on by post-traumatic stress disorder and massive drug use. The prosecution not only withheld a wealth of material evidence but also misled the jury into rejecting petitioner's defense and sentencing him to die. The prosecution undercut petitioner's experts on the ground that there was no independent evidence of petitioner's drug use; offered rebuttal witnesses to prove that petitioner was not a drug addict while suppressing the evidence that impeached those witnesses; presented an expert who relied on that flawed rebuttal testimony; and finally argued to the jury that the very premise of petitioner's only defense

was a sham when in fact the State knew that it was supported by the substantial evidence the prosecutors had withheld. That conduct – like respondent's subsequent misrepresentations that have thus far succeeded in precluding any adjudication of petitioner's *Brady* claim – was outrageous. *See generally* Br. of *Amici* Former Prosecutors 3, 12 (describing prosecution's duty of candor). Respondent's argument that the State's misconduct was immaterial to the verdict or sentence is unpersuasive.

1. As respondent acknowledges, the only disputed question under *Brady* is whether the suppressed evidence was "material" to the outcome of petitioner's case. Br. 43. It was. "[A] trial resulting in a verdict worthy of confidence" cannot occur when the prosecution suppresses evidence that goes to the heart of a substantial defense both at the guilt and capital sentencing stages and that directly impeaches key governmental witnesses. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *cf. South Carolina v. Holmes*, 547 U.S. 319, 324 (2006) ("[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."). The "jury must be allowed not only to consider such evidence, or to *have such evidence before it*, but to respond to it in a reasoned, moral manner *and to weigh such evidence* in its calculus of deciding whether a defendant is truly deserving of death." *Brewer v. Quarterman*, 127 S. Ct. 1706, 1714 (2007) (emphases added).

At sentencing, petitioner's defense was central to the jury's determination whether to impose the death penalty. State law required the jury to consider, as

mitigating factors, whether "[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance" and whether "[t]he capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment." Tenn. Code § 39-2404(j)(2), (8) (repealed 1982). The jury was moreover entitled to give independent mitigating weight to, and vote for a life sentence based upon, any evidence of petitioner's mental illness, drug use, or intoxication, even apart from the statutory mitigating factors. *See, e.g.*, *Penry v. Lynaugh*, 532 U.S. 782 (2001). In addition, proof that petitioner committed the crimes in the course of an amphetamine psychosis and therefore was not aware of the consequences of his actions would have directly undercut the prosecution's reliance on two aggravating factors that were dependent on petitioner's mental state: that petitioner acted with "depravity of mind" and that he acted with the "purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution." Trial Tr. 2151-54. That was particularly critical because, on direct review, the Tennessee Supreme Court invalidated the jury's reliance on a third aggravator – that petitioner knowingly created a further great risk of death to two or more other persons. *State v. Cone*, 665 S.W.2d 87, 95 (Tenn. 1984). Had the jury in fact heard the evidence suppressed by the prosecutors, there is a substantial prospect that it would not have imposed

the death penalty based on the only remaining aggravating circumstance argued by the State: that petitioner had been previously convicted of a violent felony. Trial Tr. 2151-54.[1]

Critically, if petitioner had proved the factual premise of his sole defense – *i.e.*, that he was in fact a severe drug addict – there was a substantial prospect that at least one juror would have been persuaded not to sentence him to death. That is so because, as respondent acknowledges (Br. 44), "[t]wo expert witnesses testified in support of Cone's mental health defense" that, as a result of petitioner's post-traumatic stress disorder and severe drug addiction, he committed the crimes in an "amphetamine psychosis" – a recognized mental illness – that prevented him from recognizing the wrongfulness of his acts and conforming his conduct to the standards of society. *See generally* Pet. Br. 46 (describing the testimony). *Contra* Resp. Br. 43 (mischaracterizing petitioner's defense as merely "that he was a drug user and was acting under the influence of drugs at the time of the murders").

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[1] As to guilt, petitioner was not criminally responsible for his acts "if at the time of [his] conduct as a result of mental disease or defect he lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Graham v. State*, 547 S.W.2d 531, 540 (Tenn. 1977) (adopting American Law Institute, Model Penal Code § 4.01 (1962)). Once the jury concluded that petitioner's proof established "reasonable doubt as to the defendant's sanity, the burden of proof on the issue shift[ed] to the State" to prove sanity "beyond a reasonable doubt." *Id.* at 544.

The prosecution notably did not contest the testimony of petitioner's experts that – given petitioner's post-traumatic stress disorder – an amphetamine psychosis would have been brought on by massive drug use, *if* petitioner was in fact a severe drug addict. Nor could it: as *amicus curiae* Veterans for America explains, petitioner's condition is well recognized. *Amicus* Br. 3 ("[V]eterans suffering from PTSD often turn to substance abuse to deaden their symptoms, bringing on a vicious cycle of self-destructive behavior."); *id.* at 10 ("The impulse to self-medicate through substance abuse is especially high among those suffering from PTSD as a result of combat trauma."). Rather, the State's strategy was to defeat the very factual premise of the experts' opinions by establishing that petitioner was not a drug addict.

The prosecution effectuated that strategy through reinforcing layers of misconduct and misrepresentations. Its investigation of the case had produced an array of evidence strongly supporting the conclusion that petitioner was severely addicted to drugs, all of which the State suppressed. *See generally* Pet. Br. 42-45. But the prosecution's misconduct was far more outrageous even than withholding the very evidence that was central to petitioner's case and the jury's determination whether to send petitioner to his death. The prosecutors compounded their unlawful suppression of that evidence by *emphasizing* to the jury that petitioner's defense was weak because it rested entirely on petitioner's supposedly self-serving assertions of his own drug use. *See* Pet. Br. 41-42 (collecting trial excerpts in which prosecution

established that petitioner's witnesses relied on petitioner's own assertions regarding drug use); *see, e.g.*, *Trammel v. McKune*, 485 F.3d 546, 551-52 (10th Cir. 2007) (McConnell, J.) (finding a *Brady* violation because prosecution withheld evidence supporting defendant's theory and yet argued on rebuttal there was "virtually no evidence" to support defendant's theory); *Bailey v. Rae*, 339 F.3d 1107, 1117 (9th Cir. 2003) (suppression of evidence is "all the more alarming given that the State . . . showcased to the jury the defense's paucity of evidence").

The State then put on its own rebuttal witnesses – Officer Ralph Roby, FBI Agent Flynn, and Ilene Blankman – for the sole purpose of persuading the jury not to find a fact that was strongly supported by evidence the prosecution had suppressed: that petitioner was a severe drug addict. The State compounded this misleading testimony by offering a further rebuttal expert – John Hutson – who rested his opinion that petitioner knew the consequences of his actions on the testimony of the State's rebuttal witnesses that petitioner was not a drug addict. *See* Pet. Br. 43 (citing Tr. 1982).

Finally, the prosecutors argued to the jury that petitioner's defense was a fabrication invented from whole cloth, when in fact they knew it was supported by substantial evidence. The prosecutor thus did not dispute that amphetamine psychosis was a proper defense, but instead repeatedly stressed to the jury that the proof at trial was that petitioner "wasn't drug crazy. He [was] a robber and a killer. Simple as that. Nothing complicated about this." J.A. 108. *See also* J.A. 113 ("You're dealing, I submit to you, with a

premeditated, cool, deliberate – and even cowardly, really – murder[er].").

As the Tennessee Supreme Court later concluded, given the record and arguments at trial, it was essentially inevitable that on this record the jury would convict petitioner and sentence him to death. The jury perceived petitioner to present "a tenuous defense, at best": his experts' "testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse," and "[l]ay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to the degree and extent of his drug abuse." *State v. Cone*, 665 S.W.2d 87, 90 (Tenn. 1984). The cumulative effect of the prosecution's sweeping misconduct was that the jury rendered its verdict and sentence of death based on a grossly distorted picture of the facts, such that it is not now fairly possible to accept the jury's judgment with confidence.

2. Respondent's assertion that the evidence suppressed by the prosecution was not material is belied by the trial record. Respondent submits that the evidence was superfluous because "[t]he jury heard substantial evidence of Cone's drug use, including the testimony of two expert witnesses and his mother." Br. 44. But respondent took precisely the opposite position before the jury – *viz.*, that all of this evidence was unreliable because it was based not on personal knowledge but on petitioner's own statements. Thus, while respondent goes to pains to describe the testimony of defense expert Matthew Jaremko that petitioner suffered from "a substance-abuse disorder" (Br. 6) and of expert Jonathan

Lipman detailing petitioner's extensive "history of drug abuse" (*id.* at 7), he omits any mention of the prosecution's devastating response to that testimony at trial: that the experts "[j]ust took [petitioner's] word" regarding his drug abuse. J.A. 111. And the State told the jurors that Hutson won the battle of the experts "hands down," because he did not merely base his conclusions on "just what that man told him." J.A. 111-12.[2]

Indeed, the supposedly "unrebutted testimony" at trial of petitioner's drug use on which respondent bases his position (Br. 44) rested on, as respondent now acknowledges, "information Cone had reported," "Cone's admission[s]," and "Cone's assertion[s]" (*id.*). The prosecutor's argument that such testimony was unreliable second-hand *post hoc* invention surely resonated with the jury, which knew petitioner only as a confessed murderer and which was presented with the contrary rebuttal testimony of a police officer and an FBI agent. "The likely damage [caused by the suppression of evidence] is best understood by taking the word of the prosecutor" at trial (*Kyles*, 514 U.S. at 444), not the later rationalizations of the State's post-conviction appellate counsel.

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[2] Thus, while the jury received some evidence of petitioner's "drug dependency . . . and its effects," petitioner's counsel was forced to argue that "the testimony of the experts established the existence of mitigating circumstances." *Bell v. Cone*, 535 U.S. 685, 699 (2002). As discussed in the text, the prosecutors suppressed the evidence that would have established the factual foundation for the experts' conclusions.

Respondent places particular emphasis on the fact that "[t]he proof at trial showed that, at the time of the offense, Cone was in possession of a significant variety and quantity of narcotics and other controlled substances." Br. 44. That is factually accurate, but respondent's argument ignores that the prosecutors advised the jury that "Cone's possession of this quantity and variety of drug items – four bags of marijuana, 24 vials of four different narcotic drugs, and 5,163 tablets consisting of 18 different narcotics in 61 separate containers – demonstrated that he was a drug dealer, arguing in closing that Cone 'had a drug store in [his] car.'" *Id.* at 5 (citation omitted). With the State having suppressed the evidence supporting the conclusion that petitioner was *using* those drugs, the jury had no reason to disbelieve the prosecution's closing argument: "I'm not trying to be absurd, but he says he's a drug addict. I say balon[e]y. He's a drug seller." J.A. 107.

Had it not been suppressed, "[t]he testimony of more disinterested witnesses . . . would quite naturally be given much greater weight by the jury." *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). Respondent misstates the record in asserting that the suppressed evidence of those witnesses' statements "says nothing about Cone's mental state at the time of the crime and does not impeach the testimony of any of the numerous witnesses who observed Cone in the period surrounding the murders." Resp. Br. 43-44. In fact, as detailed in petitioner's opening brief (at 42), the evidence included persuasive first-hand observations of petitioner shortly before, during, and soon after the crimes that strongly supported petitioner's defense. J.A. 49 (suppressed witness

statement regarding robbery on the day before the murders confirming that petitioner "appear[ed] to be drunk or high" because "he acted real weird"); *id.* at 50 (suppressed witness statement that just after jewelry store robbery petitioner "looked wild eyed"); *id.* at 53 (suppressed witness statement that after petitioner fled to Florida soon after the murders petitioner was "agitated" and "looking about in a frenzied manner").

By contrast, notwithstanding respondent's unsupported contrary assertion (Br. 44-45), the prosecution did not introduce any evidence of petitioner's mental state at the time of the crimes. To the extent that the jury heard anything relevant from the witnesses to the crimes, that testimony hardly constitutes the kind of overwhelming proof that petitioner was acting rationally at the time he committed the crimes that would give confidence in the jury's judgment on such a prosecutorially distorted record. Tr. 1188 (Herschel Dalton) ("I could see a look of desperation in his eyes."); *id.* at 1189 ("[Witness] started hearing a clicking sound . . . and [he] looked back and there he was, aiming the gun at the sky and just clicking away.").

Nor can respondent succeed in his assertion that the evidence withheld by the prosecution would not have impeached the State's rebuttal witnesses. According to respondent, "[n]either Roby, Flynn, nor Blankman testified that Cone was not a drug user; rather, each of the witnesses confined their testimony to their observations of Cone in the days after the murders, during which time they did not observe him use drugs, and he did not appear to be under the influence." Br. 47. But this is no more than a back-

handed acknowledgment that the rebuttal testimony from these limited observations was relatively weak, a fact that makes the prejudice resulting from the State's suppression of the impeachment evidence stronger. The prosecution's emphatic argument to the jury that petitioner did not commit the crimes in the course of an amphetamine psychosis because he was not a drug addict rested not on actual proof of petitioner's mental state at the time of the crimes, but instead on these inferences drawn from this thin testimony that respondent now backhands. But the jury had no realistic choice other than to accept that testimony because it constituted the *only* remotely direct evidence actually introduced at the trial on the question of petitioner's drug addiction.

Respondent's specific assertion that "the evidence in no way impeaches the testimony of [rebuttal witness] Sergeant Ralph Roby that he observed no needle marks on Cone's body when he saw him" (Resp. Br. 46) is inexplicable. The prosecution did not call Roby as a *dermatologist*. The very point of his rebuttal testimony was to answer the defense's claim that petitioner was a drug addict. It blinks reality to say that the jury would not have found material the evidence suppressed by the prosecutors that Roby himself had distributed the teletypes describing petitioner as an addict (J.A. 55-57); interviewed petitioner's sister, who described petitioner's severe drug problems (*id.* at 59-60); and interviewed another witness who agreed that petitioner appeared to be on drugs before the crimes (*id.* at 49). *See generally* Pet. Br. 43.

Respondent similarly ignores the role of the State's rebuttal witnesses in his assertion (Br. 46)

that FBI Agent Flynn's testimony that petitioner "was mentally alert, provided details of his recent travels, and exhibited no signs of a mental disease or defect [in an interview] is in no way inconsistent with any of the FBI alerts Cone now insist were 'exculpatory.'" That argument rests on the dubious premise that the jury would have found Flynn's testimony about his limited observations during this single interview while petitioner was in custody – at a time when petitioner had no access to drugs and thus could not have been suffering from an amphetamine psychosis – to be *more* persuasive than the teletypes, which reflected the FBI's working understanding on the basis of its investigation that petitioner was a severe drug addict. *See* Pet. Br. 44.

3. Ultimately, while the parties agree that this Court should resolve the merits of petitioner's *Brady* claim (*see* Resp. Br. 26-27), the Court may instead elect to leave that task to the lower courts on remand in the first instance. Respondent does not dispute the showing in petitioner's opening brief (at 48-52) that the Sixth Circuit's passing assessment of petitioner's *Brady* claim rested on a serious legal error. The court of appeals compartmentalized the different categories of evidence suppressed by the prosecution into "four separate *Brady* claims" (Pet. App. 18a) and considered "each category of [withheld] documents separately" (*id.* at 57a). But a court must assess the materiality of evidence under *Brady* as the jury would: "collectively, not item by item." *Kyles*, 514 U.S. at 436. The court of appeals thus failed to properly assess the cumulative effect of the suppressed evidence on the reliability of petitioner's trial. *See* Pet. Br. 49.

The Sixth Circuit also failed to account for the context of the trial, including the facts that the prosecutors misled the jury in numerous respects; that petitioner could be sentenced to death only if every juror voted for that punishment (Tenn. Code § 39-2404 (1979)); and that the reliability of the death sentence is separately undermined by the fact that it rested on an aggravating circumstance that the Tennessee Supreme Court held on direct review to be unsupported by the trial evidence (*see* 665 S.W.2d at 95). Respondent's brief notably does not defend the Sixth Circuit's legal framework for evaluating petitioner's *Brady* claim, and the judgment can accordingly be reversed and the case remanded for further proceedings on that basis.

At the very least, the Sixth Circuit's judgment should be reversed because the court of appeals deprived petitioner of any opportunity to develop facts supporting his *Brady* claim through an evidentiary hearing in the district court. Even if, contrary to petitioner's principal submission, the record as it stands is not sufficiently developed to establish the materiality of the evidence suppressed by the prosecution, there is a substantial prospect that additional fact-finding could produce a different result. For example, petitioner could develop proof of additional evidence and lines of effective cross-examination of the State's lay and expert witnesses that his counsel would have pursued if he had been provided with the significant withheld evidence that petitioner was not merely a drug addict, but was in the throes of an amphetamine psychosis when he committed the crimes. The district court would also be in a position to assess whether the prosecution

would have presented its rebuttal case at all if the State had disclosed the available impeachment evidence. Accordingly, if this Court concludes that the existing record does not establish the materiality of the evidence suppressed by the prosecution, the case should be remanded to the district court for further proceedings. *See* Pet. Br. 51-52.[3]

* * * *

This Court's prior rulings sustaining the death sentence in this case are grounded on a basic faith in the judgments that arise from criminal trials under our system of justice. In *Bell v. Cone*, 535 U.S. 685, 699-702 (2002), the Court held that, given the limited available evidence supporting petitioner's defense, petitioner's trial counsel (having initially focused on petitioner's mental health as the mitigating circumstance justifying a life sentence) made a reasonable strategic judgment to waive his closing argument to the jury. Subsequently, in *Bell v. Cone*, 543 U.S. 447, 455-59 (2005) (per curiam), the Court held that the penalty phase instructions appropriately guided the sentencing determination

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[3] No point would be served by remanding the case to the state courts. *Cf.* Tr. of Oral Arg., No. 07-1223, *Bell v. Kelly*, 12-17 (Nov. 12, 2008). The three-year statute of limitations for petitioner to seek post-conviction relief (Tenn. Code § 40-30-102 (repealed 1995)) has expired. No exception exists for subsequently discovered *Brady* claims. *Harris v. State*, 102 S.W.3d 587 (Tenn. 2003). When the federal courts do adjudicate the *Brady* claim, they will owe no deference to any fact-finding by the state courts, which made no "determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

by the jury, which was able to consider all the relevant evidence in imposing the death penalty.

When a trial comports with basic principles of due process, that faith is fully warranted. But when prosecutorial misconduct so thoroughly pervades the jury's evaluation of the defense in a capital case, the verdict and sentence are not worthy of confidence, and allowing them to stand threatens the integrity of, and public confidence in, the fair administration of the death penalty. Petitioner caused two deaths, for which he was properly subject to trial and the prospect of execution, dependent on the jury's assessment of his mental capacity to understand the wrongfulness of his acts and to conform his conduct to the requirements of society. But in violation of the basic due process obligations embodied in *Brady*, the prosecution stacked the deck in guilt and sentencing proceedings that were, unbeknownst to the court and to petitioner's counsel, a farce. The State's misrepresentations first to the jury and later to the state and federal courts have precluded any fair adjudication of the case against petitioner. The judgment accordingly should be reversed.

CONCLUSION

For the foregoing reasons, as well as those in the petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 1, 2008

APPENDIX

APPENDIX A: MEMORANDUM FINDINGS OF FACT AND CONCLUSIONS OF LAW (EXCERPTS)

THURSDAY, DECEMBER 16, 19

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION X

GARY BRADFORD CONE,
PETITIONER

VS. P-06874

STATE OF TENNESSEE,
RESPONDENT

MEMORANDUM FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is Petitioner, Gary Bradford Cone's Second Petition for Post Conviction Relief.

***

Likewise, grounds 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 involves a potpourri of various errors by the court at the trial all of which grounds have been considered and denied in direct appeal or the First Post Conviction Petition.

***

APPENDIX B: PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF & MOTION TO DISMISS AND STATEMENT & AMENDMENT REGARDING ISSUE OF WAIVER (EXCERPTS)

OCTOBER 5, 1993

IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE

GARY BRADFORD CONE,
PETITIONER

VS. P-06874

STATE OF TENNESSEE,
RESPONDENT

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF & MOTION TO DISMISS AND STATEMENT & AMENDMENT REGARDING ISSUE OF WAIVER

Comes now Petitioner Gary Bradford Cone, and pursuant to T.C.A. §40-30-101 et. seq., Article I §§ 7, 8, 9, 10, 16 of the Tennessee Constitution, the Fourth Fifth Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and respectfully replies that contrary to Respondent's assertions, petitioner must be afforded an evidentiary hearing encompassing the issue of waiver and the merits of his claim.

***

Petitioner must be afforded a full and fair opportunity to prove that he has never waived his claims, and he must be afforded a fully and fair opportunity to demonstrate the validity of his claims.

***

APPENDIX C: OPINION OF TENNESSEE COURT OF CRIMINAL APPEALS

Court of Criminal Appeals of Tennessee,

at Jackson.

Gary Bradford CONE, Appellant,

v.

STATE of Tennessee, Appellee.

March 22, 1995.

Permission to Appeal Denied by

Supreme Court March 4, 1996.

Stephen R. Glassroth, Glassroth & Associates, P.C., Montgomery, Alabama, Kemper B. Durand, Thomason, Hendrix, Harvey, Johnson & Mitchell, Memphis, for Appellant.

Charles W. Burson, Attorney General and Reporter, Rebecca L. Gundt, Assistant Attorney General, Criminal Justice Division, Nashville, John W. Pierotti, District Attorney General, Kevin Rardin, Asst. Dist. Attorney General, Memphis, for Appellee.

OPINION

SUMMERS, Judge.

The appellant, Gary Bradford Cone, was convicted of murder and sentenced to death in 1982. After unsuccessfully appealing to the Tennessee Supreme Court, the appellant filed a petition for

post-conviction relief. Appellant's first petition was denied, and this Court affirmed the denial. Appellant then filed a second petition, which was dismissed by the trial court. On appeal, this Court remanded the trial court's denial of the appellant's second post-conviction petition in order to give the appellant an opportunity to rebut the presumption of waiver arising from the previous post-conviction proceedings. Appellant filed a lengthy factual affidavit concerning waiver and, following oral argument on the waiver issue, the trial court found that all of the issues raised by the appellant's amended second petition were either previously determined or waived. Accordingly, the trial court dismissed the appellant's second petition. The appellant now appeals the trial court's denial of his second post-conviction petition, presenting for our review the related issues of whether the trial court's dismissal was either premature or incorrect. Having carefully considered both issues, we find them to be without merit and affirm the judgment of the trial court.

ANALYSIS

Appellant contends that the trial court's dismissal of his second petition was premature, because the state had not adequately responded to the petition as amended and because the trial court declined to hold an evidentiary hearing.[4] The

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[4] The appellant argues that in our previous opinion, *Cone v. State*, C.C.A. No. 48, 1991 WL 77535 (Tenn. Crim. App. May 15, 1991), we remanded to the trial court for an evidentiary

appellant's position on this issue is based on the Tennessee Supreme Court cases of *Swanson v. State*, 749 S.W.2d 731 (Tenn. 1988), and *Allen v. State*, 854 S.W.2d 873 (Tenn. 1993). In both *Swanson* and *Allen*, *pro se* post-conviction petitions were summarily dismissed upon the state's motion without appointment of counsel or an evidentiary hearing. The cases cited by the appellant are of limited relevance where, as here, the post-conviction petitioner had the benefit of appointed counsel to review and amend his original *pro se* petition. Furthermore, *Swanson* and *Allen* recognized that dismissal without an evidentiary hearing is proper where the petition fails to state a "colorable claim for relief," *Allen v. State*, 854 S.W.2d 873, 876, or where the claims in the petition are "conclusively incorrect." *Swanson v. State*, 749 S.W.2d 731, 736. Our conclusion as to the timeliness of the trial court's dismissal is therefore dependent on our resolution of the substantive issues of waiver and previous determination.

Grounds for relief which have been previously determined or waived are not cognizable in a post-conviction action. T.C.A. § 40-30-111 (1990). Tennessee Code Annotated Section 40-30-112 (1990) provides as follows:

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hearing. In that opinion, we held only that the appellant was entitled to an opportunity to rebut the presumption of waiver. *Id.* We did not intend to require the trial court to conduct an evidentiary hearing.

> A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

The trial court, in memorandum findings of fact and conclusions of law, addressed the fifty-two separate grounds alleged by the appellant as a basis for post-conviction relief. Had Judge Williams not provided this Court with such an exemplary and meticulous treatment of the appellant's petition, our task in reviewing the relevant issues would have been difficult if not insurmountable.

In post-conviction proceedings, the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. *McBee v. State*, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the findings of the trial court in post-conviction hearings are conclusive on appeal unless the evidence preponderates against the judgment. *State v. Buford*, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983); *Clenny v. State*, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

The trial court found that most of the appellant's stated grounds for relief, in addition to being repetitious and cumulative, were previously determined either on direct appeal or in the

appellant's first petition. The trial court also noted that many of the appellant's "grounds" are merely conclusory allegations which fail to state a constitutional deprivation and are therefore not cognizable in a post-conviction action.[5] Finally, the trial court found that the appellant had failed to rebut the presumption of waiver which would preclude the consideration of any new grounds raised in the appellant's petition.

The appellant's second petition contains the following blanket statement on the issue of waiver:

> The above claims were not raised previously either due to the law regarding the claim not being established at the time, ineffective assistance of counsel, the novelty of the claim or counsel's failure to apprise petitioner of the claim or its relevance to his case. Because of this, the petitioner himself has never had an opportunity before now to either raise these claims or waive them. Neither petitioner nor any person previously appointed to represent petitioner has knowingly and understandingly failed to raise any and all such claims earlier.

The appellant contends that this statement alone is sufficient to rebut the presumption of waiver and that the trial court's dismissal of his second petition was therefore incorrect.

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[5] Post-conviction relief will only be granted where a defendant's conviction or sentence is either void or voidable due to the abridgement of a constitutional right. T.C.A. § 40-30-105 (1990).

As for the appellant's claim that some of the issues raised in his second petition were "novel" or that the law concerning some issues was uncertain, we find, as did the trial court, that the appellant has failed to present any support for this vague and conclusory statement. Furthermore, because the appellant did not address the issue of "new law" in his brief or on oral argument to this court, the issue is waived. *See* Tenn. Rules of Crim. App. Rule 10(b); T.R.A.P. Rule 27(a)(7); *State v. Chance*, 778 S.W.2d 457, 462 (Tenn. Crim. App. 1989).

In his first post-conviction petition, the appellant presented five factual allegations to support his constitutional claim of ineffective assistance of counsel. His second petition, on the other hand, listed thirty-five separate deficiencies in his trial counsel's performance. The trial court found that ineffective assistance of counsel is a single "ground for relief" as contemplated by the statute, *see* T.C.A. § 40-30-111, and that the issue of ineffective assistance of counsel issue was therefore previously determined. We agree with the trial court. A petitioner may not relitigate a previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts to revive an issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.

Finally, the appellant maintains that he did not waive any issues "knowingly and understandingly" as required by the statute. *See* T.C.A. § 40-30-112(b)(1). The trial court found that the appellant's mere statement that he did not understand the issues or appreciate the significance of them was insufficient,

without further explanation, to rebut the presumption of waiver. Parenthetically, the trial court noted that the appellant was neither illiterate nor unsophisticated. In fact, the appellant graduated with honors from the University of Arkansas and had been accepted for admission into law school after scoring in the ninety-sixth percentile on his law school admission test.

We must agree with the trial court that the appellant should not be able to extend the post-conviction process and delay the administration of justice ad infinitum by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed. As Justice Kennedy wrote for the United States Supreme Court in *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991), "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system." *Id.* at 492, 111 S. Ct. at 1469. Our own Tennessee Supreme Court observed in 1972:

> There must be a finality to all litigation, criminal as well as civil. The courts, the executive branch of government, the legal profession, and the public have been seriously inconvenienced by the prosecutions of baseless habeas corpus and post-conviction proceedings. Defendants to criminal prosecutions, like parties to civil suits, should be bound by the judgments therein entered. When they fail to make timely objections to errors of the courts they must not be allowed at later times of their own choosing-often perhaps, after witnesses against them have become

unavailable-to assert those grounds in post-conviction actions.

Arthur v. State, 483 S.W.2d 95, 97 (Tenn.1972).

CONCLUSION

We conclude that the appellant failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined. The trial court's decision to dismiss the appellant's petition without an evidentiary hearing was neither improper nor premature. The judgment of the trial court is therefore:

AFFIRMED.

The appellant's sentence of death by electrocution is set for July 1, 1995, unless otherwise stayed by appropriate authority.

PEAY and HAYES, JJ., concur.

APPENDIX D: APPLICATION FOR PERMISSION TO APPEAL TO THE TENNESSEE SUPREME COURT (EXCERPTS)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON, TENNESSEE

No. _____

CCA No. 02C01-94030-CR-00052

GARY BRADFORD CONE,
Applicant-Appellant

v.

STATE OF TENNESSEE,
Respondent-Appellee

GARY BRADFORD CONE'S
APPLICATION FOR PERMISSION TO APPEAL

***

Pursuant to Tenn. R. App. P. 11, Applicant Gary Bradford Cone respectfully requests that this Honorable Court grant him permission to appeal the Court of Criminal Appeals' judgment in State of Tennessee v. Gary Bradford Cone, No. 02C01-9403-CR-00052 (Tenn. Cr. App. Mar. 22, 1995) (Appendix A).

***

C.

Brady Claim

As noted supra, after Cone received access to the file of the Shelby District Attorney General under the Tennessee Public Records Act, he amended his petition to include Brady claims (R. 139-144, ¶ 41). Cone alleged that the documents contained in the District Attorney General's file and withheld at trial entitled him to post-conviction relief:

***

The trial court, however, denied relief on the claim, and the Court of Criminal appeals affirmed. Gary Cone was never afforded a hearing on his Brady claims.

***

C. TO SECURE UNIFORMITY OF DECISION, THIS COURT SHOULD GRANT THE APPLICATION ON THE BRADY ISSUE

As noted supra, Gary Cone raised a Brady claim in 1993 after receiving access to the files of the District Attorney General under the Tennessee Public Records Act, following the 1992 Tennessee Court of Criminal Appeals decision in Capital Case Resource Center v. Woodall, No. 01-A-01-9104-CH-00150 (Tenn. App. Nashville, Jan. 29, 1992). In reviewing the file, Cone uncovered various documents which demonstrated that he did not possess the *mens rea* necessary for conviction of first-degree murder, and which conflicted with the prosecution's theory of the case at trial. See R. 138, 139. The trial court, however, never addressed the

claim on the merits, and the Court of Criminal Appeals affirmed.

In Caldwell v. State, No. 02C01-9405-00099 (Tenn. Cr. App. Dec. 28, 1994) (Appendix G), the Court of Criminal Appeals held that when a post-conviction petitioner first obtains documents through the Tennessee Public Records Act after filing a prior post-conviction petition, the petitioner's claim is not waived: "If a petitioner was not and could not have been aware of a possible constitutional claim until 1992 [when Woodall was decided] it is doubtful that the defense of waiver would apply." Id. slip op. at 11. Gary Cone, however, did not receive a hearing on his claim.

This Court, however, has just recently granted application for permission to appeal in State of Tennessee v. Richard Caldwell, Madison County No. 02S01-9505-CC-00044 (Tenn. May 30, 1995) (granting application for permission to appeal), to consider whether "waiver" and/or the post-conviction statute of limitations applies to claims arising from Public Records disclosed after 1992, and after a prior post-conviction petition has been decided.

The trial court's ruling on Gary Cone's claim was erroneous and it conflicts squarely with Caldwell. Gary Cone's petition should be granted, since this Court has also granted review in Caldwell to review the identical issue. This is necessary to insure uniform application of the law on this vital issue. Tenn. R. App. P. 11(a)(1), (a)(3), (a)(4). Alternatively, this Court should hold the application pending the disposition of Caldwell, and then grant the petition and remand for further proceedings, including an evidentiary hearing.

***

AMICUS CURIAE BRIEF

NOV. 7, 2008

No. 07-1114

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

As stated by petitioner in the Petition for Writ of Certiorari:

"The question presented is whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of *Brady* v. *Maryland*, which encompasses two subquestions:

"1. Is a federal habeas claim 'procedurally defaulted' because it has been presented twice to the state courts?

"2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?"

Fairly included in the petitioner's questions are these questions:

3. Was the *Brady* claim in this case fairly presented to the state courts at all?

4. Did the "last reasoned opinion" of the state courts in this case err?

5. Can a federal habeas court declare a state-court procedural default ruling "inadequate," as an "exorbitant application" of a generally valid state rule, on the basis of an argument that the petitioner never presented to the state court that made the dispositive ruling?

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IN THE

Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to represent the interests of victims of crime and the law-abiding public in the criminal justice system. In this case, petitioner asks this Court to expand the "inadequate state grounds" doctrine far beyond its present extent to reopen a weak claim correctly rejected by the state appellate court over a decade ago, further delaying justice in a case where it is already grossly overdue. This request is contrary to the interests CJLF was formed to protect.

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1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

SUMMARY OF FACTS AND CASE

Twenty-eight years ago, on August 10, 1980, Shipley Todd, 93, and his wife Cleopatra Todd, 79, were in their home in Memphis, Tennessee. Gary Cone broke the latch on their back door and entered their home. See *State* v. *Cone*, 665 S. W. 2d 87, 90 (Tenn. 1984) (direct appeal). Cone was on the run from a jewelry store robbery he committed the day before. In the course of his escape, he shot a police officer pursuing him, shot one private citizen, and would have shot a third but for running out of ammunition. See *ibid.* As Cone later stated to his own expert, " 'he was at [the Todds'] house with the *agenda* of getting cleaned up, getting fed, so that he could flee the area. And in the course of his time there they ceased to cooperate with him, and he started to try to control them . . . ." *Id.*, at 91 (emphasis added). He controlled them by beating them to death, and his identity as the perpetrator has never been in doubt. See *id.*, at 90; Brief for Respondent 5-6.

Cone engaged in premeditated, goal-directed activities before, during, and after the crimes against Mr. and Mrs. Todd. See Brief for Respondent 48-49. Even so, with no doubt of identity in the case, he resorted to a mental defense. The experts for each side gave conflicting opinions. See 665 S. W. 2d, at 92. Not surprisingly, given the defendant's ability to understand what he was doing as demonstrated by the undisputed facts of the crimes and escape, the jury rejected his mental defense. See *ibid.* Also unsurprisingly, the jury chose a sentence of death for "the brutal murders of two elderly defenseless persons by an escaping armed robber who had terrorized a residential neighborhood for twenty-four hours." *Id.*, at 95-96.

On direct appeal, Cone made numerous claims, including one that "the State failed to properly produce witness statements . . . ." *Id.*, at 94. The Tennessee

Supreme Court rejected all the claims and affirmed. See *id.*, at 96.

Cone filed a state postconviction review petition, which was denied, and he appealed to the Court of Criminal Appeals. See *Cone* v. *State*, 747 S. W. 2d 353, 354 (Tenn. Crim. App. 1987). His claim of improper prosecutor argument was rejected on the merits. See *id.*, at 355. He also claimed ineffective assistance of counsel, citing five alleged shortcomings of his trial attorney. One of these was rejected as being raised for the first time on appeal, see *id.*, at 357, and the others were rejected on the merits. See *id.*, at 357-358.

Cone filed a successive postconviction petition *pro se*, which the trial court dismissed. The Court of Criminal Appeals reversed, requiring the trial court to give Cone an opportunity to rebut the presumption that claims not raised previously were waived. *Cone* v. *State*, No. 48, 1991 Tenn. Crim. App. LEXIS 364 (May 15, 1991).

On remand, the court appointed counsel. Counsel filed an amended petition, an amendment to that petition, and an affidavit intended to rebut the presumption of waiver. These documents are further described in Parts I and II, *infra*. Paragraphs 35 and 41 stated claims for nondisclosure of exculpatory evidence but failed to state any coherent legal theory, instead making a blanket allegation of violation of every conceivably relevant constitutional provision and a few inconceivable ones. See *infra*, at 8. The trial court denied all of the multitude of claims as either previously determined or defaulted.

Cone appealed again to the Court of Criminal Appeals, as described in Part III, *infra*. Nowhere in his brief did he mention *Brady* v. *Maryland*, 373 U. S. 83 (1963), or any case in that line, nor did he mention that

the factual basis for his nondisclosure claim was unavailable to him until the second postconviction proceeding. See Brief of Petitioner-Appellant, Court of Criminal Appeals (Aug. 1994), R. 4, Add. 4, Doc. 2.[2] The appellate court affirmed. *Cone* v. *State*, 927 S. W. 2d 579 (Tenn. Crim. App. 1995).

Cone requested discretionary review of this decision by the Tennessee Supreme Court. For the first time in all of his state pleadings, petitioner finally identified paragraph 41 of his petition as a *Brady* claim. See Application for Permission to Appeal 6, R. 4, Add. 4, Doc. 8. He also made to the Supreme Court the argument he did not make to the Court of Criminal Appeals, *i.e.*, that he raised the *Brady* claim at the first opportunity after obtaining access to the facts. See *id.*, at 12-13. He argued that the Court of Criminal Appeals' decision was in conflict with another decision then under review, dealing with the issue of waiver in circumstances similar to Cone's case. See *id.*, at 13-14. The Tennessee Supreme Court denied the application, and it denied a petition for rehearing. See App. to Pet. for Cert. 93a-94a. This Court denied certiorari. *Cone* v. *Tennessee*, 519 U. S. 934 (1996).

Almost 17 years after the crime, the case finally proceeded to federal habeas. Sorting out the properly presented claims from the defaulted ones despite the confused presentation, see App. to Pet. for Cert. 98a, the District Court found only 4 out of 51 claims had been properly exhausted and not defaulted. See *id.*, at 99a. With regard to the *Brady* claims, the District Court held that the claims were defaulted and Cone had not established cause. See *id.*, at 114a-115a. The

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2. Citations to the record follow the form in the Brief for Respondent 2, n. 1. Scanned copies of the documents are also on CJLF's website at http://www.cjlf.org/briefs/Cone/Cone.htm.

District Court alternatively rejected the claims on the merits. With regard to the nondisclosed evidence of drug use, the District Court held, "the evidence does not devastate the state's case or even credibly impeach the state's witnesses. Cone's claims in this regard are exaggerated and devoid of merit." *Id.*, at 119a, n. 9. The District Court further held that Cone could not meet his burden of proof that the documents were not, in fact, disclosed. See *ibid.*

On appeal, the Court of Appeals for the Sixth Circuit affirmed on the *Brady* claim. The Court of Appeals panel held, without dissent, "we believe that Cone's claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default." *Cone* v. *Bell*, 243 F. 3d 961, 968 (CA6 2001). The Court of Appeals then held in the alternative, again without dissent, "even if that were not so, we are satisfied that the documents Cone complains were withheld are not *Brady* material." *Ibid.* The Court of Appeals granted relief on ineffective assistance, however, see *id.*, at 979, and this Court reversed. *Bell* v. *Cone*, 535 U. S. 685 (2002).

On remand, the Court of Appeals again granted relief, this time finding an aggravating circumstance impermissibly vague. See *Cone* v. *Bell*, 359 F. 3d 785, 797-799 (CA6 2004). Under the standard of 28 U. S. C. § 2254(d), this conclusion was so clearly erroneous as to warrant unanimous summary reversal. See *Bell* v. *Cone*, 543 U. S. 447 (2005) (*per curiam*). On remand for the second time, a majority of the panel reiterated its conclusion that the *Brady* claim was both defaulted and meritless. See *Cone* v. *Bell*, 492 F. 3d 743, 756 (CA6 2007).

This Court granted certiorari on June 23, 2008.

SUMMARY OF ARGUMENT

Before a claim may be made on federal habeas corpus, it must be "fairly presented" to the state courts. Petitioner's presentation to the trial court was not a fair presentation of a claim under *Brady* v. *Maryland* as defined by this Court's precedents. An allegation of fact combined with a blanket invocation of broad constitutional rights is insufficient to invoke "the more particular analysis" of a doctrine such as *Brady*.

The controlling state court opinion in this case, that of the Court of Criminal Appeals, held that the nondisclosure claim was procedurally defaulted, not previously determined. That court correctly addressed the arguments presented to it. Petitioner now claims this is an "exorbitant application" of the state rule because he did, in fact, have good cause for not presenting his claim earlier. However, this argument was not presented to the state appellate court. By analogy to *Edwards* v. *Carpenter*, petitioner cannot defeat the application of a valid state rule with a claim that he qualified for an exception when he did not present that argument to the proper state court.

The Court of Appeals' rejection of the *Brady* claim on the merits is holding, not dictum. Petitioner did not seek review of this holding, it is not the kind of issue this Court normally reviews, and it is correct.

ARGUMENT

In parts II and III, *infra*, *amicus* will address how the federal courts should deal with the confusing record of state court proceedings in this case. First, though we believe it is necessary to place in context the reason for the confused state of the record.

I. The difficulty in this case is due in substantial part to the scattershot pleading of state collateral review counsel.

"It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the result). Justice Jackson's wisdom about a flood of applications applies equally to a flood of claims within a single application, and this principle is important to understanding the nature of the state-court proceedings in this case.

Pages 17-22 of the Joint Appendix present this Court with the needle and several straws, minus the bulk of the haystack. This is closer to the picture postconviction counsel *should* have presented to the trial court, if the *Brady* claim were really as weighty as present counsel contends. It is not the picture they *did* present, and therein lies the problem.

Petitioner's August 3, 1993 postconviction petition contained 90 claims and subclaims. See Brief for Respondent 14. Paragraph 35, excerpted in the Joint Appendix at pages 13-14, is a claim for nondisclosure of exculpatory evidence. However, it is not stated as a claim under *Brady* v. *Maryland*, 373 U. S. 83 (1963), or even under the Due Process Clause. Instead, counsel alleged, "The State violated petitioner's rights under [the] Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" and parallel provisions of the Tennessee Constitution. Such blanket allegations are insufficient to fairly present a claim to the state court for the purpose of the exhaustion rule. See Part II, *infra*. Paragraphs 21-36 in this petition all alleged a violation of the same constitutional provisions. R. 4, Add. 4, Doc. 1, pp. 77-81.

Two months later, counsel for petitioner presented an amendment adding 12 additional claims. The first of these, paragraph 41, is the nondisclosure claim that is the primary subject of the case in this Court, *i.e.*, nondisclosure of evidence of petitioner's drug use. See J. A. 20. Again, there is no citation to *Brady* or even specifically to the Due Process Clause. Instead, counsel claimed a violation of the nine constitutional provisions claimed in most of the claims in the original petition, plus five new ones. Nondisclosure of exculpatory evidence now violates constitutional protections regarding double jeopardy, see Tenn. Const. Art. I, § 10, ex post facto laws, see *id.*, § 11, indictment, see *id.*, § 14, and open courts, see *id.*, § 17, the state trial court was told. Following paragraph 41 are 11 more claims, all alleging violation of the same 13 constitutional provisions. R. 4, Add. 4, Doc. 1, pp. 139-144.

In an ideal world of unlimited resources, judges would pick through every straw in the haystack, finally discovering the one or two needles. The world is not ideal, though, and it never will be. Courts depend on lawyers to sift, refine, and focus the issues. Just as they do not have the resources to seek out issues that counsel has failed to brief, see *Baldwin* v. *Reese*, 541 U. S. 27, 31-32 (2004), they do not have the resources to find the needle that counsel buries in a haystack. Faced with the complete failure of postconviction counsel to perform the focusing function, the trial court painted with a broad brush. In that process, claim 41 was mistakenly assigned to the wrong category, designated "previously determined" with a group of others, rather than "waived," *i.e.*, procedurally defaulted, as it should have been.

In this Court, petitioner asserts that there is little question that this claim is meritorious. See Brief for Petitioner 52; but see Brief for Respondent 41-50. The

lack of attention to this supposedly compelling claim by the state trial court is directly attributable to the haystack briefing of postconviction counsel. Such briefing is not only a disservice to the judicial system, it is bad advocacy. As this Court noted a quarter century ago, "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983). Later writers are in accord. See B. Clary, S. Paulsen, & M. Vanselow, Advocacy on Appeal 35, 61 (2d ed. 2004); A. Scalia & B. Garner, Making Your Case: The Art of Persuading Judges 23 (2008).

Regrettably, the capital defense bar has developed a culture that is diametrically opposed to the wisdom of *Jones*. Lawyers are exhorted to bury courts in paper, to file motions "just to make trouble," Lyon, Defending the Death Penalty Case: What Makes Death Different, 42 Mercer L. Rev. 695, 700 (1991), and to make arguments so frivolous they would be sanctionable in a civil case. See Freedman, The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases, 31 Hofstra L. Rev. 1167 (2003). These exhortations are flatly contrary to long-established norms of ethical advocacy. "Ethical considerations . . . prevent counsel from making dilatory motions . . . or advancing frivolous or improper arguments . . . ." *McCoy* v. *Court of Appeals of Wis., Dist. 1*, 486 U. S. 429, 435 (1988).

Amicus CJLF respectfully asks this Court to unequivocally reassert the principles of *Jones* and *McCoy* as fully applicable to capital cases. Appellate and postconviction counsel do *not* have an obligation to make every conceivable argument, as Freedman suggests they do, see 31 Hofstra L. Rev., at 1179, but rather they have an obligation not to. As explained by

this Court in *Jones* and by analogy to Justice Jackson's insights in *Brown*, burying the arguably meritorious claim in a flood of worthless ones reduces rather than enhances the possibility of obtaining relief in the state court.

At one time, when the procedural default rule was the primary limitation on federal habeas corpus, making every conceivable argument in state court was arguably defensible. Some believed that the goal was not to actually win there so much as to preserve arguments for the "real" battle in federal court. But see *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983) ("secondary and limited"). The theory was that even an argument clearly precluded by this Court's precedents needed to be preserved in the hope that the "annually improvised . . . 'death is different' jurisprudence," see *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), might sprout a new branch between state and federal review. That was a realistic expectation during a time of chaotic jurisprudence. For example, few could have expected, when this Court was focused on curbing arbitrariness in capital sentencing and requiring that discretion be "directed and limited," see *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976), that it would someday hold that a state *must* allow each individual juror to decide what is mitigating. But it did just that in *Mills* v. *Maryland*, 486 U. S. 367 (1988).

Today the habeas landscape is dramatically different. The procedural default rule is one of the lesser restrictions on federal habeas corpus for state prisoners, with relatively broad exceptions. Instead of the prior rule of *de novo* review, a weak claim rejected on the merits by the state court post-AEDPA cannot produce a grant of relief in federal court under 28 U. S. C. § 2254(d), because a decision rejecting a weak claim is necessarily reasonable. "Preserving" a claim that is

certain to be barred by § 2254(d) is pointless. The only claims resolved on the merits in state court that can later be grounds for federal habeas relief are those so strong on existing law that the state court's rejection would be unreasonable. Few, if any, cases have more such claims than can be counted on one hand.

Effective and ethical advocacy in capital cases is the same as in other cases in this regard. Counsel should focus on the strong claims and let the weak ones go. In this respect, death is not different. Counsel need not make every argument and must not make frivolous ones. States paying for counsel should pay for the focused advocacy described in *Jones*, not the kind of haystack dump that occurred in this case. It would help prevent problems such as the one in this case if this Court would expressly say so.

II. The *Brady* claim was not fairly presented to the state trial court.

A. Questions Fairly Included in the Questions Presented.

While petitioner protests that the Court of Appeals failed to examine what happened in the state courts in this case, see Brief for Petitioner 29, he simultaneously attempts to preclude two arguments regarding what really did happen there: "(i) that petitioner defaulted his *Brady* claim by not raising it prior to his second amended state post-conviction application, or (ii) that paragraph 41 of that application was insufficiently detailed to preserve the claim for federal habeas review." Brief for Petitioner 22, n. 4. However, the questions properly before this Court include not only the petitioner's questions as he chooses to word them but also any "subsidiary question fairly included in the question presented." *Caspari* v. *Bohlen*, 510 U. S. 383,

389 (1994). Such questions include any "necessary predicate" to the question presented. *Id.*, at 390.

In *Ohio* v. *Robinette*, 519 U. S. 33, 35 (1996), the question presented was whether an advisement was required before asking a lawfully stopped motorist for consent to search. The question of whether the motorist really was lawfully stopped at that point was "a 'predicate to an intelligent resolution' of the question presented and therefore 'fairly included therein.' " *Id.*, at 38. Like the question in *Robinette*, each of petitioner's two questions in this case has a questionable premise, and the correctness of the premise is fairly included in the question.[3]

As for petitioner's argument that these precise points were not raised below, no such precision is required. The state's position throughout the federal litigation has been that the claim is defaulted. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992). Even when an issue has never been raised by a party at all, this Court has the discretion to, and sometimes does, address an issue raised for the first time in this Court by an *amicus curiae*. See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion).

Petitioner's first question is whether "a federal habeas claim [is] 'procedurally defaulted' because it has been presented twice to the state courts?" A necessary

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3. This analysis assumes that the questions presented are limited to petitioner's two "subquestions." See Brief for Petitioner i. Arguably, the issues properly before the Court include every question fairly included in "whether petitioner is entitled to federal habeas review of his [*Brady*] claim . . . ." See *ibid.*

predicate to that question is that the claim *has* been presented to the state courts. We will address that question in this Part. In his second question presented, petitioner asks, "Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?" We address a necessary predicate to that question in Part III, *infra*.

B. Fair Presentation.

Petitioner protests that in earlier stages of this litigation, the State shifted positions between saying that the *Brady* claim was rejected by the state courts as previously determined, rejected by them as procedurally defaulted, and never presented to the state courts at all. See Brief for Petitioner 21. This confusion is, in reality, completely understandable in light of the failure of postconviction counsel to simply and clearly identify the *Brady* claim and the unfortunate but understandable error of the trial court in ruling on the scattershot petition. See Part I, *supra*. In retrospect, the "previously determined" holding was erroneous, but whether the claim was ever "fairly presented" to the state courts as required for subsequent consideration on federal habeas is doubtful.

A petitioner must fairly present his federal claim to the state courts first, before collateral review of the claim on federal habeas corpus is permitted. See *Baldwin* v. *Reese*, 541 U. S. 27, 29 (2004). Similar principles apply on direct review of state judgments in this Court. In *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928), a state habeas case, the Court held that the federal claim must be stated with "fair precision and in due time." See also *Adams* v. *Robertson*, 520 U. S. 83, 87 (1997) (*per curiam*) (civil case, quoting *Bryant*).

In *Teague* v. *Lane*, 489 U. S. 288 (1989), the petitioner challenged the selection of his jury under multiple theories. The Sixth Amendment theory presented to the state courts was not sufficient to meet the requirement of fair presentation so as to preserve an equal protection theory based on *Swain* v. *Alabama*, 380 U. S. 202 (1965). See *Teague*, *supra*, at 298. Similarly, in *Yee*, 503 U. S., at 533, presentation of a takings claim did not preserve a substantive due process claim. In *Gray* v. *Netherland*, 518 U. S. 152, 162-166 (1996), the Court distinguished between two different due process claims and remanded one of them for a determination of whether it had been presented to the state courts. Thus, simply alerting the state court to the federal nature of the claim is not sufficient to preserve all federal theories. The statement in *Baldwin* v. *Reese*, 541 U. S. 27, 32 (2004), that petitioner need only designate the claim "federal" was made in the context where the petitioner had plainly stated an ineffective assistance claim and the only question was whether the claim was made under state or federal law.

So the question is, can a litigant preserve every conceivable federal constitutional theory simply by alleging a violation of every conceivably relevant provision of the Constitution, without citing a single federal case, a single state case relying on federal law, or even which clause of the multiclause amendments he is relying on? See J. A. 20. *Anderson* v. *Harless*, 459 U. S. 4 (1982) (*per curiam*), suggests the answer is no. The habeas petitioner in that case presented the federal court with a claim that the jury instruction violated the rule of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), against burden-shifting presumptions. He had presented the facts underlying the claim to the state court. *Anderson*, *supra*, at 6. He had invoked the broad federal due process right through citation of a state case involving that right. See *id.*, at 7. That was not suffi-

cient to present a claim based on "the more particular analysis developed in cases such as *Sandstrom*, *supra*." *Ibid.*; see also *Gray*, 518 U. S., at 162-165 (applying *Anderson*).

The policy behind the exhaustion rule and the inseparable procedural default rule, see *infra*, at 25, reinforces the implication that "more particular analysis" is required to preserve a claim.[4] Since 1886, federal law has required state prisoners to make their claims in state court before turning to the federal courts. See *Ex parte Royall*, 117 U. S. 241, 251-252 (1886); 28 U. S. C. § 2254(b). This requires giving the state courts a fair opportunity to correct the alleged error by fairly presenting the claim. *Baldwin*, 541 U. S., at 29. Raising the claim for the first time on a petition for discretionary review is not enough. See *Castille* v. *Peoples*, 489 U. S. 346, 349, 351 (1989). Nor is raising the claim in a lower state court but dropping it as the case moves up the chain of review. See *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999); *Baldwin*, *supra*, at 29-30, 32.

Based on these principles and precedents, merely stating facts underlying a claim combined with a general citation of constitutional rights does not constitute a fair presentation of a federal claim to the state courts. As discussed in Part I, as a practical matter courts depend on lawyers to identify the issues. Lawyers ought not dump this function on the courts, and they should not be rewarded for doing so with a rule that preserves the claims they fail to identify with "fair precision." To the extent that the oft-repeated phrase that a petitioner need not cite "book and verse," see,

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4. The question of whether *pro se* petitioners should be given more slack, see *Pollard* v. *United States*, 352 U. S. 354, 359 (1957), is not presented by this case. All of the pleadings in question were drafted by attorneys.

e.g., *Picard* v. *Connor*, 404 U. S. 270, 278 (1971), is contrary to this principle, it should be disapproved. Among petitioner's pleadings in state court, the very first reference to *Brady* v. *Maryland*, 373 U. S. 83 (1963), appears in his petition for discretionary review in the Tennessee Supreme Court. See *supra*, at 4. *Brady* was not cited to the state trial court in the amendment making the claim based on the late-discovered evidence, see J. A. 19-21, nor is it mentioned in the amendment and memorandum petitioner filed a month later. See Amendment to Petition for Post Conviction Relief and Memorandum Concerning Personal Nature of Waiver Under Tenn. Code Ann. § 40-30-112(b), R. 4, Add. 4, Doc. 1, pp. 164-171.

Petitioner gave the state trial court even less of a "fair opportunity" to decide his *Brady* claim than the efforts found insufficient in *Castille* v. *Peoples*, *O'Sullivan* v. *Boerckel*, and *Baldwin* v. *Reese*. He failed to present the "more particular analysis," the same as the petitioner in *Anderson* v. *Harless*. While the Sixth Circuit's basis for holding that the claim was defaulted was incorrect, the holding itself was correct. As a claim never *fairly* presented to the state courts and not available there now, the claim is defaulted. See *Teague*, 489 U. S., at 297-299.

III. The controlling state court opinion in this case properly held that the claim was defaulted.

A. The Default Holding.

In his second question presented, petitioner asks, "Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?" A "necessary predicate" to this question, see Part II-A, *supra*, is whether the state

court erred. The state court that matters did not err. Petitioner attempts to preclude this question, Brief for Petitioner 22, n. 4, probably because he realizes it is a fatal flaw in his case, but it is fairly included under *Caspari* v. *Bohlen*, 510 U. S. 383, 389-390 (1994), and *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996). See Part II-A, *supra*, at 11-13.

The state trial court in this case found that claim 41 of the second post-conviction petition was barred as "heretofore determined." J. A. 22. That decision, however, is not the controlling one for the purpose of procedural default analysis in federal habeas corpus. The decision that matters is the "last reasoned opinion." *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991). In the present case, that is the decision of the Tennessee Court of Criminal Appeals in *Cone* v. *State*, 927 S. W. 2d 579 (1995). The Tennessee Supreme Court's denial of discretionary review without comment, see Brief for Petitioner 7-8, is presumed to be on the same basis as that opinion. See *Nunnemaker*, *supra*, at 803.

At the time of the state collateral proceedings in this case, the pertinent Tennessee statute provided, "Grounds for relief which have been previously determined or waived are not cognizable in a post-conviction action." See *Cone*, 927 S. W. 2d, at 580. Showing the influence of *Fay* v. *Noia*, 372 U. S. 391 (1963), and *Sanders* v. *United States*, 373 U. S. 1 (1963), the statute defined "waived" in terms of "knowingly and understandingly failed to present" the claim, see *Cone*, *supra*, at 581, but then went on to create a rebuttable presumption of waiver from simple failure to raise the claim in the prior proceeding. See also *House* v. *State*, 911 S. W. 2d 705, 708-711 (Tenn. 1995) (tracing history of Post-Conviction Procedure Act and influence of federal case law on it).

Petitioner claims, citing pages 580-581 of the opinion, that the Court of Criminal Appeals ruled "that petitioner's *Brady* claim was 'previously determined either on direct appeal or in appellant's first petition.' " Brief for Petitioner 7. That is not correct. The passage cited summarizes appellant's contentions, the applicable law, part of the case history, and the trial court decision. It does not state a holding by the Court of Criminal Appeals. The passage does not single out the *Brady* claim and specify the ground for denying it. The paragraph containing the phrase quoted by petitioner reads in full:

> "The trial court found that most of the appellant's stated grounds for relief, in addition to being repetitious and cumulative, were previously determined either on direct appeal or in the appellant's first petition. The trial court also noted that many of the appellant's 'grounds' are merely conclusory allegations which fail to state a constitutional deprivation and are therefore not cognizable in a post-conviction action.[2] Finally, the trial court found that the appellant had failed to rebut the presumption of waiver which would preclude the consideration of any new grounds raised in the appellant's petition.

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2. Post-conviction relief will only be granted where a defendant's conviction or sentence is either void or voidable due to the abridgement of a constitutional right. T.C.A. § 40-30-105 (1990)." *Cone*, 927 S. W. 2d, at 581.

In the Joint Appendix are excerpts of pleadings in the *trial court* where petitioner makes a claim of withholding of exculpatory evidence (albeit without citing *Brady*) and makes a showing of why he did not raise that claim earlier. See J. A. 13-14, 17-18, 20-21.

Conspicuously absent from the Joint Appendix is the excerpt of petitioner's brief in the Court of Criminal Appeals where he identifies the *Brady* claim and pinpoints for that court the evidence in the record showing that the factual basis of the claim was unavailable to both petitioner and his counsel until the second postconviction petition.

The reason the *Brady* passage of this brief is not in the Joint Appendix is that there is no such passage. The claim that petitioner *now* contends is so compelling that it undermines confidence in the verdict, see Brief for Petitioner 39, was *never mentioned* in the principal brief to the court that issued the dispositive decision in this case. See R. 4, Add. 4, Doc. 2 (cited below as "CCA Brief"). In the reply brief, there is only a passing mention of the claim. See Court of Criminal Appeals Reply Brief 5, R. 4, Add. 4, Doc. 4. In neither brief was the factual cause for not raising that claim on prior reviews ever specifically pointed out to the appellate court. In this Court, Cone pinpoints paragraph 41 of his affidavit, see J. A. 17-18, but in the Court of Criminal Appeals the only mentions of this document are blanket references to the entire 41-page affidavit with the conclusory assertion that it refutes the presumption of waiver. See CCA Brief 6-8, 13-14, 16, 18.

In *Baldwin* v. *Reese*, 541 U. S. 27, 31 (2004), this Court noted that appellate courts often decide cases from reading the briefs alone and do not read the lower court opinion in every case. Because of the burden that would be imposed on state courts, *Baldwin* held that the petitioner must bring the attention of the appellate court to the federal claim in the appellate brief. See *id.*, at 32. The appearance of that claim in the lower court opinion is not sufficient to meet the fair presentation requirement.

To find the factual assertion that petitioner claims established cause for not bringing the claim earlier (or, in Tennessee parlance, rebutted the presumption of waiver), the Court of Criminal Appeals would not only have had to go beyond the brief into the trial court's opinion, it would have had to go beyond that opinion and comb the trial court pleadings itself. This would be a greater burden on the court than the one that *Baldwin* found would be excessive. Cf. *id.*, at 31-32. As in *Baldwin*, the burden on postconviction counsel to fairly present the claim would have been minor.

What postconviction counsel did instead was emphasize two main points. First, they claimed that the new deficiencies they had found in trial counsel's performance created a new claim, different from the ineffective assistance claim previously determined. See CCA Brief 14-15. Coincidentally that issue is now before this Court in *Bell* v. *Kelly*, No. 07-1223. Second, on the issue of waiver they maintained strenuously that waiver had to be personal to the petitioner and that the affidavit "conclusively established that he, *personally*, did not waive the claims advanced in his successive petition, as amended." CCA Brief 13 (emphasis in original). For the claims supposedly not waived, they briefed only one. That was a claim regarding the jury instructions under *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). See CCA Brief 16. *Sandstrom* was decided before the crime in this case, so both the legal and factual bases for a challenge to the instruction were available to trial counsel, appellate counsel, and first postconviction counsel. See *Cone* v. *Bell*, 243 F. 3d 961, 973-975 (CA6 2001) (rejecting this claim as defaulted).

Whether "waiver" under Tennessee postconviction law was personal to the defendant and judged on a subjective standard or rather judged on an objective standard so as to include claims defaulted by counsel

without petitioner's personal involvement was unsettled at the time this case was briefed. The question was then pending before the Tennessee Supreme Court in the *House* case. See CCA Brief 13, n. 2; see also *House* v. *Bell*, 547 U. S. 518, 534 (2006). In its decision in the present case, the Court of Criminal Appeals implicitly adopted the objective approach, citing this Court's decision in *McCleskey* v. *Zant*, 499 U. S. 467, 492 (1991), and the Tennessee Supreme Court's decision in *Arthur* v. *State*, 483 S. W. 2d 95, 97 (1972). See *Cone* v. *State*, 927 S. W. 2d 579, 582 (Tenn. Crim. App. 1995). Petitioner's argument that he had not *personally* waived the new claims was therefore insufficient. Six months later, the Tennessee Supreme Court expressly adopted the objective standard, citing the same authorities. See *House* v. *State*, 911 S. W. 2d 705, 714 (1995). Six months after *House*, the Tennessee Supreme Court denied review of the Court of Criminal Appeals' decision in Cone's case. See Brief for Petitioner 8.

The holding of the Court of Criminal Appeals is on page 582, not pages 580-581 as petitioner claims: "We conclude that the appellant failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." The court correctly rejected the only attack on the presumption of waiver that petitioner made in his principal appellate brief. The fact that the court did not *sua sponte* locate in the record and decide another attack petitioner might have made is irrelevant under *Baldwin*.

The Court of Criminal Appeals also did not correct the trial court's error in assigning claim 41 to the "previously determined" category rather than the "waived" category. There are two good reasons why it did not. First, petitioner never specifically mentioned claim 41 in his appellate brief, nor did he explain why

the trial court was mistaken on that particular point. His only mention of claim 41 in the reply brief makes only a conclusory statement that the claim had not been waived and does not mention that it was mistakenly designated as previously determined. Second, appellate courts are in the business of reviewing judgments, not opinions. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). Given the holding of the Court of Criminal Appeals that the petitioner had failed to rebut the presumption of waiver as to all new claims, the assignment of a claim to one category or the other made no difference in the judgment.

To the extent that petitioner may be considered to have presented a *Brady* claim at all, but see Part II, *supra*, petitioner is correct that this claim had not been presented to the state courts in a prior proceeding. See Brief for Petitioner 29; Brief for Respondent 31-32. The opinion of the Court of Criminal Appeals is best interpreted as holding that this claim, along with all other new claims, was defaulted. Indeed, postconviction counsel themselves appear to have interpreted it that way, briefing the *Brady* claim to the Tennessee Supreme Court as a "waiver" issue. See *supra*, at 4. The Court of Criminal Appeals made a blanket holding for all the new claims for the simple reason that petitioner made a blanket argument for all these claims. The Court of Criminal Appeals correctly decided the argument presented to it, and that decision is an adequate and independent state ground for the judgment.

B. Adequacy.

Petitioner's second question presented is, "Is a federal court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?" Generally, the state court holding on a ques-

tion of state law is binding on the federal court. See *Bradshaw* v. *Richey*, 546 U. S. 74, 76 (2005) (*per curiam*). This is true of procedural rulings as well as substantive ones. See *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 129 (1945). The federal court is indeed "powerless" to substitute its own opinion of state law for that of the state court, but review of the claim on the merits is not always precluded.

The most common way around a state procedural default is the "cause and prejudice" exception of *Wainwright* v. *Sykes*, 433 U. S. 72, 90-91 (1977), and its progeny. Indeed, in the many states where the state's procedural default rule parallels *Sykes*, see *Sanchez-Llamas* v. *Oregon*, 548 U. S. 331, 351 (2006), there is no need to declare that the state court erred because the federal court can evaluate directly, as a matter of federal law, the same cause that petitioner says should have been considered by the state court.

The second route around procedural default is inadequacy of the state ground. Petitioner invokes this line of cases, see Brief for Petitioner 30-36, but to the extent he implies that the line authorizes a simple second-guessing of the determination of state law, see *id.*, at 34, he is mistaken. The "adequate state grounds" line is confused and in dire need of clarification, see Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA* v. *Williams*, No. 07-1216, pp. 8-13, but not even its most extreme stretches go that far.

Procedural default law evolves in the state courts just as it has in this Court. See, *e.g.*, *Sykes*, 433 U. S., at 87-88 (cause and prejudice test supplanting former test for default); *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991) (same for abuse of the writ). In the course of this evolution, a petitioner may find that a default that previously would have been excused no longer will be,

just as Sykes and McCleskey did. A decision that differs from state precedent does not warrant a federal court declaring the state rule inadequate. What will result in such a holding is a "bait and switch," such that a litigant following a procedure previously considered correct, not merely excusable, finds himself without a remedy. Compare *Reich* v. *Collins*, 513 U. S. 106, 111 (1994) ("bait and switch"), with *Walker* v. *Birmingham*, 388 U. S. 307, 320 (1967) ("on notice" of correct procedure). *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988), on which petitioner relies, is a bait-and-switch case where the procedure the petitioner used had been expressly declared to be the correct one. No bait and switch occurred here. All Tennessee defendants had notice that claims needed to be made on direct appeal if possible and otherwise on the first petition, and the only uncertainty was the circumstances under which failure to do so would be excused.

Petitioner also invokes *Lee* v. *Kemna*, 534 U. S. 362 (2002), one of a "limited category" of "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id.*, at 376. Regardless of whether *Lee*'s "exorbitant application" rule, see *ibid.*, would render the trial court decision an "inadequate" bar, there is nothing exorbitant about the decision that matters, that of the Court of Criminal Appeals.

Petitioner contends that his *Brady* claim was not procedurally defaulted under state law because the factual basis for the claim was not available until the second postconviction petition, which is essentially the same as the argument for cause for default under the federal *Sykes* test. See Brief for Petitioner 7, n. 1, 36-37, n. 7. Assuming *arguendo* that rejection of this argument by the Court of Criminal Appeals would have

been an "exorbitant application" of the state rule, petitioner still cannot prevail because he did not make that argument to that court.

In *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000), the Court noted that the procedural default doctrine is inseparable from the exhaustion rule. It is "necessary to protect the integrity of the federal exhaustion rule." *Id.*, at 453 (internal quotation marks omitted). The purposes of that rule "would be . . . frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistently with its own procedural rules, have entertained it." *Ibid.* (emphasis in original). Edwards had presented a sufficiency-of-evidence claim for the first time in an untimely petition that followed both direct appeal and postconviction review, and he asserted ineffective assistance as cause for not bringing that claim earlier. See *id.*, at 448-449. The Court held that unless the default of the ineffective assistance claim was itself excused, that claim could not form the basis of an excuse for the main claim. The petitioner had not given the state courts a "*fair* opportunity to pass upon his claims," *id.*, at 453 (emphasis in original, internal quotation marks and brackets omitted), when he presented his cause for default late, unless he also had cause for *that* late presentation.

In the present case, Cone did not present his cause for late presentation of claim 41 to the Court of Criminal Appeals at all. See Part III-A, *supra*; Brief for Respondent 33-35. The principles underlying *Edwards* and *Baldwin* apply equally to this case. If a petitioner can claim that the state court's application of its generally sound rule is inadequate because he had cause for default which he never pointed out to the appellate court, the purpose of the rule requiring fair presentation would be defeated. As in *Baldwin*, the fact that the

appellate court could have found this cause in the record itself is not sufficient. See *supra*, at 19-20. The rule of *Lee* v. *Kemna* provides no basis for dodging the decision of a state appellate court that correctly decided the arguments presented to it.

IV. A subclaim or the factual basis for a claim can be procedurally defaulted when the claim is rejected in a successive state petition as "previously determined."

Although *amicus* CJLF believes it is not necessary to the resolution of the case, a few words of clarification are in order regarding the relationship between the rejection of a claim as previously determined and the status of the claim under the procedural default rule. Petitioner is correct that repeated presentation of a claim already fairly presented once cannot render that claim defaulted. See Brief for Petitioner 25. However, "claims" do not always come with crisply defined edges. They tend to grow as the case moves through the system, and that growth makes the problem more complex.

The pre-AEDPA federal habeas law distinguished between a second habeas petition presenting a new "ground" and one that did not. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 14-19. Ineffective assistance was a single "ground" then, see *id.*, at 16, and it is a single "claim" under the current statute. See *id.*, at 17-19. In the present case, the state trial court understood "ground" in Tennessee law the same way, so it rejected the ineffective assistance allegations as "previously determined" even though many of the subclaims were new. Memorandum, Criminal Court, 30th Dist., 2-4 (Dec. 16, 1993), R. 4, Add. 4, Doc. 1, pp. 219-221.

The federal procedural default rule operates at a finer level. The factual basis of a claim can be defaulted when the legal argument was timely presented. See *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 7-8 (1992). Also, as the District Court recognized in the present case, ineffective assistance subclaims presented for the first time in the second state postconviction petition are defaulted when the state court rejects the whole ineffective assistance claim as "previously determined." See App. to Pet. for Cert. 106a-109a. See *Bradshaw* v. *Richey*, 546 U. S. 74, 79-80 (2005) (*per curiam*) (default of "subclaims" of ineffective assistance).

There is no need to brief this point in detail because it is not actually presented by the facts of this case on the question presented in this Court. *Amicus* mentions it only to caution against possible dicta suggesting that a claim rejected as previously determined on a successive state petition is necessarily open in its entirety for review on the merits in federal court. That conclusion does not follow.

V. Regardless of procedural default, the Court of Appeals' rejection of Cone's claim on the merits is sufficient to affirm the judgment or to dismiss the writ of certiorari as improvidently granted.

Petitioner maintains, "No court has ever fully considered, let alone ruled upon, the merits of petitioner's *Brady* claim." Brief for Petitioner 37. That is not correct. The Court of Appeals has considered this case three times now, and on the third time it held "the documents discussed in the dissenting opinion that were allegedly withheld are not *Brady* material. We said this before in *Cone*, 243 F. 3d, at 968-70, and we now say it again." *Cone* v. *Bell*, 492 F. 3d 743, 756

(CA6 2007). This is holding, not dictum. Petitioner's "question presented" does not challenge this holding.

In its first decision of this case, the Court of Appeals held without dissent that the *Brady* claim was procedurally defaulted. See *supra*, at 5. Cone's attempt to reopen a closed question on remand from this Court therefore raised the "law of the case" doctrine. The Sixth Circuit follows the standard rule: "The law of the case doctrine . . . precludes reconsideration of a previously decided issue unless one of three 'exceptional circumstances' exists: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Westside Mothers* v. *Olszewski*, 454 F. 3d 532, 538 (CA6 2006); see 18B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4478, p. 670 (2d ed. 2002). There has been no subsequent trial, so clause (1) does not apply. The court considered and rejected the argument that *Banks* v. *Dretke*, 540 U. S. 668 (2004), was a major change in the law for the purpose of clause (2). See *Cone*, 492 F. 3d, at 754. Indeed, it could not be, as *Banks* was decided on habeas corpus and subject to the *Teague* rule. See *Breard* v. *Greene*, 523 U. S. 371, 377 (1998) (*per curiam*) (novel theories are necessarily *Teague*-barred). The question of whether any exception to the law-of-the-case rule applies thus comes down to clause (3).

The dissent says, "The law of the case doctrine . . . does not wed us forever to a clear misreading of the record," 492 F. 3d, at 765, evidently a reference to the "clearly erroneous" prong of clause (3). The majority says the dissent's argument is interesting but need not be considered because the evidence is not *Brady* material, *id.*, at 756, which can only be a reference to the

conjunctive requirement of clause (3) that there be a miscarriage of justice. This is a holding, not dictum, that petitioner has not qualified for an exception to the law of the case doctrine because even if the court reversed itself on procedural default and reached the merits, the claim has no merit.

The law of the case doctrine by itself does not shield a lower court's decision from review in this Court. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 817-818 (1988). However, in this case the lower court's holding on law of the case constitutes a holding on the merits of the underlying claim. That holding is simply the application of settled law to particular facts. Although petitioner devotes almost half of his brief arguing the point, it is not one this Court should decide. First, the application of settled law is not normally the kind of question that calls for the invocation of this Court's discretionary review. See Supreme Court Rule 10, last sentence. Second, decision of the merits of the *Brady* claim is not fairly included in the question petitioner asked this Court to decide in his certiorari petition, *i.e.*, whether the Court of Appeals was required to reach the merits. The merits question is not a predicate to the procedural default question, cf. *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994), but just the opposite. The merits are not normally reached unless and until the procedural default question has been decided in the petitioner's favor. See *Lambrix* v. *Singletary*, 520 U. S. 518, 524 (1997).

No compelling claim of a miscarriage of justice calls for this Court to set aside its normal approach to the questions to be decided. There is no question in this case that Gary Cone is, in fact, the person who so brutally butchered the elderly Shipley and Cleopatra Todd, simply to ransack their home in order to make his escape. See *State* v. *Cone*, 665 S. W. 2d 87, 89-90

(Tenn. 1984). The discussion of post-traumatic stress disorder (PTSD) by *amicus* Veterans for America is essentially irrelevant because PTSD evidence was not withheld by the prosecution. The evidence in dispute relates to drug use. That evidence is very weak. The defendant engaged in clearly goal-directed activity to obtain money for the purpose of making his cross-country escape for the purpose of evading the police who were attempting to arrest him. These are not the actions of a person so out of touch with reality as to be incapable of the very rudimentary mental state needed for criminal culpability. See *id.*, at 90-91; App. to Pet. for Cert. 118a-119a, n. 9 (District Court opinion). Evidence that the defendant used drugs habitually or was on drugs on the day before the crime has minimal weight in comparison to facts of the crime and defendant's own statement to his own expert.

If this Court were to decide the question presented in petitioner's favor but not decide the question he tries to smuggle in, what relief could it order? Petitioner's demand for an evidentiary hearing, see Brief for Petitioner 51, is unsupported by precedent. If evidence not specifically requested is not materially exculpatory on its face, it is not *Brady* material. See *United States* v. *Agurs*, 427 U. S. 97, 107 (1976).

Should the Court issue its standard order for proceedings not inconsistent with the Court's opinion? The Court of Appeals could comply simply by restating for a third time its twice-stated conclusion that the evidence in question is not *Brady* material. The only thing accomplished by such a remand would be delay. But this case has been delayed far too long already. This is a well-deserved sentence for a brutal, selfish crime against a helpless, elderly couple who were simply minding their own business in their own home. Its execution is long overdue.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed, or the writ of certiorari should be dismissed as improvidently granted.

November, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(8)

Supreme Court, U.S.
FILED
SEP 12 2008
OFFICE OF THE CLERK

No. 07-1114

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,

v.

RICKY BELL, WARDEN
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICI CURIAE* FORMER PROSECUTORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are former prosecutors, identified in the Appendix, who have a continuing interest in the fair and effective functioning of the criminal justice system. *Amici* believe that, in order to promote the administration of justice, prosecutors must perform their official responsibilities in strict conformance with applicable standards of conduct and fairness, including their overarching duty "to seek justice, not merely to convict." *ABA Standards for Criminal Justice* 3-1.2(c), at 4 (3d ed. 1993) (*ABA Crim. Justice Stds.*). As this Court has explained, the prosecutor is "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

A fundamental component of the prosecutor's duty to act "as a minister of justice and not simply [as] an advocate" is the obligation to ensure the "consideration of exculpatory evidence known to the prosecution." *ABA Crim. Justice Stds.* 3-3.11 cmt., at 82; *see* ABA, Model Code of Prof'l Responsibility DR 7-103(B). The prosecutor's obligation to disclose exculpatory evidence to the defense is embodied in

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

the constitutional requirements set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

In addition, non-constitutional standards requiring the disclosure of exculpatory evidence generally "go[] beyond the corollary duty upon prosecutors imposed by constitutional law." *ABA Crim. Justice Stds.* 3-3.11 cmt., at 82; *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also, e.g.*, Tenn. R. Prof'l Conduct 3.8(d) (requiring "timely disclosure . . . of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"). Those duties concerning the disclosure of evidence favorable to the defense apply to the determination of the appropriate sentence no less than to the determination of guilt or innocence. *See ABA Crim. Justice Stds.* 3-6.2(b); *id.* 3-6.2 cmt., at 116 ("As a minister of justice, the prosecutor also has the specific obligation to see that the convicted defendant continues to be accorded procedural justice and that a fair sentence is imposed upon the basis of appropriate evidence, including consideration . . . of exculpatory information known to the prosecutor."); *see also* Tenn. R. Prof'l Conduct 3.8(d) (requiring disclosure of "all unprivileged mitigating information" "in connection with sentencing").

The prosecution's overarching duty to serve justice—rather than merely to win a case—also extends to appellate and post-conviction proceedings, the very object of which is to assure the fairness of the trial and the reliability of the result. Of particular relevance here, the prosecution has a duty of candor to all courts, including appellate and post-conviction courts. *See ABA Crim. Justice Stds.* 3-2.8(a) ("A prosecutor should not intentionally misrepresent

matters of fact or law to the court."). The prosecutor, that is, "must be scrupulously candid and truthful in his or her representations in respect to any matter before the court. This is not only a basic ethical requirement, but is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice." *Id.* 3-2.8 cmt., at 36 (footnote omitted). Accordingly, it is *amici*'s experience that courts considering claims for appellate or post-conviction relief rely on the prosecution to provide an objective and forthright description of the proceedings under review.

The prosecution's responsibility in that regard is especially pronounced in the context of post-conviction review of capital convictions and sentences. That is not only because of the magnitude of the interests at stake, but also because such cases typically involve a multitude of claims, a highly complicated procedural history, and an intricate set of waiver and default principles governing the consideration of claims. Those factors combined place a substantial premium on the reviewing court's ability to understand completely and accurately what has transpired to date. And they give rise to a considerable risk that a claim may be erroneously deemed procedurally barred—even where, as here, there is substantial merit to the claim.

In this case, for instance, the prosecution failed to disclose to the defense exculpatory evidence that was in the prosecution's possession and that bore directly on the sole defense raised by petitioner at trial and sentencing—*viz.*, that petitioner, during his commission of the charged conduct, was mentally incapacitated as the result of a drug addiction related to

post-traumatic stress from his military service. Then, when petitioner subsequently discovered the prosecution's failure to disclose the exculpatory evidence and sought in post-conviction proceedings to raise a *Brady* challenge based on that evidence, the prosecution failed to give an accurate procedural history of the claim that would have assisted the post-conviction courts in addressing its merits. The state post-conviction courts mistakenly held that petitioner's *Brady* claim had been previously determined, and the federal habeas courts erroneously concluded that the claim had been procedurally defaulted.

Amici fully agree with the reasons stated by petitioner for reversing the decision of the court of appeals. In addition, *amici* write to emphasize that the conduct of the prosecution in this case—both in the trial proceedings by failing to disclose evidence favorable to petitioner, and then in post-conviction proceedings by failing to give a full and accurate account of the procedural history—reinforce the need for this Court to reverse the court of appeals' decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner was convicted of capital murder and sentenced to death based on a crime spree that took place on August 9-10, 1980. Petitioner robbed a jewelry store and later killed a couple in their home. Petitioner did not dispute that he had committed the conduct with which he was charged. He instead raised as his sole defense that he was mentally incapacitated at the time because his drug addiction had

induced an amphetamine psychosis. Petitioner sought leniency in his capital sentencing hearing on the same basis. The prosecution argued that petitioner was not a drug addict but rather a calm, cool, and deliberate criminal.

Throughout the trial and sentencing phases, however, the prosecution had withheld from the defense substantial exculpatory evidence of petitioner's drug addiction, including eyewitness descriptions of petitioner's condition around the time of the crimes that supported his argument that he was acting under the influence of drugs. That evidence first came to light during petitioner's post-conviction proceedings, at which point petitioner timely raised a *Brady* claim. The state courts nonetheless declined to examine the claim, erroneously concluding that it had been resolved against petitioner in prior proceedings—when the evidence supporting the claim in fact had not even come to light when those proceedings occurred. The prosecution failed to present an accurate history of the case that would have helped prevent the error, in state or federal court, and the federal court of appeals refused to reverse the States' determination, concluding erroneously that the claim had been procedurally defaulted.

Erroneous determinations of procedural default like the ones in petitioner's case may be caused by a number of factors, such as the complexity of the record before the court on collateral review or the prosecution's failure to present an accurate procedural history of each claim. Regardless of the reason for the error, mistaken rulings of procedural default can result in the unwarranted denial of substantive constitutional rights. In petitioner's case, review of

the state courts' erroneous rulings should have revealed a properly raised and meritorious *Brady* claim. The evidence withheld by the prosecution at trial bore directly on petitioner's only defense—that he had committed the acts in a drug-induced psychosis related to post-traumatic stress from military service—and the prosecution in its arguments to the jury emphasized the seeming lack of evidence supporting petitioner's defense. "[T]aking the word of the prosecution," therefore, as did this Court did in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), it is plain that the evidence withheld by the prosecution was crucial to the case and undermines confidence in the verdict.

ARGUMENT

A. The Complexity Of Post-Conviction Proceedings Presents A Substantial Risk Of Mistaken Rulings Of Procedural Default, Particularly Where The Prosecution Fails To Give An Accurate Account Of The Procedural History.

As explained *infra*, pages 14-23, the prosecution in this case failed at trial to disclose evidence directly supporting the core of petitioner's defense and his argument that he should be spared a capital sentence. The prosecution then failed, in post-conviction proceedings, to give a full and accurate description of the procedural history of the resulting *Brady* claim. *See* Pet. Br. 5-7. The state courts mistakenly concluded that the claim had been previously determined against petitioner, and the federal courts erroneously ruled variously that the claim had been waived because it had not been properly presented, *see* Pet. App. 112a, 115a (district court

opinion), or that it had in fact been raised in state court but was procedurally defaulted because it was previously determined against petitioner, *see* Pet. App. 59a (court of appeals opinion).

The sequence of conflicting opinions in this case concerning the procedural history of petitioner's *Brady* claim is unsurprising in light of the prosecution's failure to present a full and accurate history of that claim to the state and federal courts. As this case well demonstrates, satisfaction of the prosecution's duty of candor is especially critical in the context of post-conviction and habeas proceedings in capital cases, where substantial layers of review, dozens of legal claims, and substantial procedural complexity present a significant risk that even meritorious claims will be mistakenly deemed procedurally barred.

1. The procedural history of this case demonstrates how a properly raised and meritorious claim nonetheless can slip through the cracks in post-conviction review. Petitioner did not learn of the exculpatory evidence possessed and withheld by the prosecution during trial until after he had filed his second amended petition for post-conviction review years later, in 1993. *See* Pet. Br. 6-7. Petitioner then filed a new amendment to the petition, adding a paragraph (¶ 41) alleging that the prosecution had withheld specified exculpatory evidence demonstrating that he suffered from drug problems and/or drug withdrawal or psychosis at the time of the offense, his defense at trial. J.A. 20-21; Pet. App. 40a. He also submitted an uncontested affidavit explaining that he "did not know of the existence of this claim in earlier proceedings, including post-conviction pro-

ceedings," and that the "facts ha[d] been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding." J.A. 17-18.

The post-conviction trial court nonetheless denied petitioner's amended petition for post-conviction relief. It did not separately explain its denial of petitioner's new *Brady* claim, although it explicitly identified that claim (*i.e.*, ¶ 41), in a list of claims rejected on the ground that they had been "restatements of grounds heretofore determined and denied" on direct appeal or in prior post-conviction proceedings. J.A. 22. The trial court's conclusion that the *Brady* claim in ¶ 41 had been previously determined was plainly erroneous: far from having been previously determined, that claim had in fact never before been raised. *See* Pet. Br. 6-7.

Notwithstanding the trial court's clear error in finding petitioner's *Brady* claim previously determined, the Tennessee Court of Criminal Appeals affirmed. The court's brief opinion did not separately address petitioner's claims but instead summarily observed that the trial court had found that "most of [petitioner's] stated grounds for relief . . . were previously determined." Ct. App. J.A. 2000.[2] The court then stated in its "conclusion" that petitioner had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." Ct. App. J.A. 2002.

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[2] Citations to the Joint Appendix filed in the court of appeals below take the form "Ct. App. J.A. [page]."

When petitioner again raised his *Brady* claim in his federal habeas petition, J.A. 23-30, the State erroneously answered that petitioner had "procedurally defaulted" the claim because it had been "waived." J.A. 39. The State relied on the Tennessee Court of Criminal Appeals' concluding statement that petitioner had "waived all claims" that "had not been previously determined." *Id.* (quotations omitted). In fact, however, both state courts (mistakenly) found petitioner's *Brady* claim to have been previously determined, not to have been waived. *See* Pet. App. 22a (concluding the "Tennessee courts held that [petitioner's] *Brady* claims were previously determined").[3]

The district court, evidently agreeing with the State's erroneous argument of procedural default due to state-court waiver, concluded that the *Brady* claim was procedurally defaulted because the state courts had deemed the claim waived. Pet. App. 102a, 112a. In the district court's view, most of the *Brady* evidence and arguments on which petitioner

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[3] Circumstances make plain that both state courts found petitioners' *Brady* claim to have been previously determined rather than waived. The state trial court had explicitly (albeit erroneously) included petitioner's *Brady* claim among of a group of claims that the court deemed previously determined, J.A. 22, and the Tennessee Court of Criminal Appeals affirmed without suggesting any disagreement on that score. To be sure, the Court of Criminal Appeals had stated conclusorily that petitioner had "waived all claims" that "had not been previously determined." But nothing in the court's opinion suggests that it—unlike the trial court—believed that petitioner's *Brady* claim fell in the category of "waived" claims instead of "previously determined" claims. And as petitioner explains, the state courts could not have concluded that the *Brady* claim had been waived. *See* Pet. Br. 7 & n.1.

relied had never been presented in the state courts, and those that had been presented had been raised only through "conclusory" (and hence inadequate) "assertions that the state had generally withheld exculpatory documents." *Id.* at 112a. The district court, however, did not mention, much less consider, the specific *Brady* arguments petitioner had properly presented in ¶ 41 of the second amended petition. *See id.* And the court gained no assistance from the State on that score, because the State erroneously asserted as a blanket matter that petitioner's *Brady* claim had been waived, J.A. 39, without any effort to distinguish among the many items of evidence and subclaims that made up that claim, *see* J.A. 24-30. Indeed, the district court itself observed that "analyzing procedural default has been made more difficult by . . . the [State's] failure to articulate which specific claims are subject to which specific procedural default." Pet. App. 98a.

On appeal, the State argued that the *Brady* claim had been procedurally defaulted because it was "simply never raised in the state court." J.A. 41. The State, like the district court, asserted that petitioner had made "[o]nly a conclusory attempt . . . to raise the allegations in his second post-conviction petition and not the specific claims as now alleged." *Id.* In support of that argument, however, the State cited only the version of the second amended petition for state post-conviction relief that had been in effect *before* petitioner had again amended the petition to add ¶ 41. *Id.* at 41-42 n.7. The State did not acknowledge or make any reference to ¶ 41, which, directly contrary to the State's argument, plainly *did*

raise petitioner's *Brady* claim with substantial specificity.[4]

Notwithstanding the State's misleading argument, the court of appeals recognized that petitioner had raised his *Brady* claim in state court. *See* Pet. App. 59a. But the court of appeals nonetheless held that petitioner had procedurally defaulted the claim on the basis that the state courts had deemed the claim previously determined. *See id.* at 22a, 24a.[5] Of course, the state courts' determination to that effect, as explained, *see* pp. 6-8, *supra,* was flatly incorrect. The court of appeals, however, declined to entertain any argument that the state courts had erred in deeming the *Brady* claim previously determined, reasoning that any such inquiry would raise federalism concerns. *See* Pet. App. 24a-25a. But even assuming *arguendo* the validity of any such federalism-based concerns, *see* Pet. Br. 29-37 (explaining that federal courts plainly have authority to revisit erroneous state court application of procedural rules), such concerns could pose no obstacle if the State itself had accurately and forthrightly acknowledged that the state courts had not previously determined petitioner's *Brady* claim against him.

2. At every step, the state post-conviction courts and federal habeas courts erred in their understand-

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[4] Indeed, the State appeared essentially to acknowledge, in its opposition to the en banc petition, that its failure to discuss (or even cite) ¶ 41 in its brief before the panel had been misleading. J.A. 46-47 & n.7.

[5] As petitioner explains, the court of appeals erred in supposing that a claim that had been previously determined in state court could therefore be procedurally defaulted for purposes of federal habeas review. *See* Pet. Br. 23-29.

ing of the procedural history of petitioner's *Brady* claim. Rather than assisting the post-conviction courts in their understanding, the State's inaccurate account of the procedural history only confused the issue and impeded the courts' consideration of the merits of the claim. Pet. Br. 5-7. The prosecution, however, is held to an especially high standard when communicating with the courts on such matters. *See ABA Crim. Justice Stds.* 3-2.8(a). The prosecutor "must be scrupulously candid and truthful in his or her representations in respect to any matter before the court." *Id.* 3-2.8 cmt., at 36 (footnote omitted); *see United States v. Casas*, 425 F.3d 23, 40-41 (1st Cir. 2005) ("Prosecutors have a duty of candor to the court."); *cf. Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 358 (1963) (recognizing that attorneys for the government have an "unqualified duty of scrupulous candor . . . in all dealings with th[e] Court").

The need for the prosecution to provide a fully objective and complete description of the procedural history of the claims under review is at its premium in the context of post-conviction review of capital sentences. In light of the magnitude of the interests, the multitude of claims, the highly complicated procedural history, and the equally complicated procedural rules concerning waiver and default that typify that context, it is essential that courts be able to rely on the prosecution to supply an entirely complete and accurate description of the proceedings under review. *But cf. Pierre v. Shulsen*, 802 F.2d 1282, 1283 (10th Cir. 1986) (explaining, in capital case, that "State's threshold response based upon procedural default in the state courts" was "mistaken" because petitioner "ha[d] preserved []his claim").

Moreover, state courts, as in this case, occasionally misapprehend the procedural history so as to deny review of a claim on the merits. *See, e.g.*, *Washington v. Renico*, 455 F.3d 722, 731 n.4 (6th Cir. 2006) (explaining that "[t]he state court . . . mistakenly[] limited its review of [the petitioner's] claim to the record as presented on appeal because [the court erroneously believed that he had] failed to move for an evidentiary hearing or a new trial") (internal alternation and quotation marks omitted), *cert. denied*, *Washington v. Lafler*, 127 S. Ct. 1877 (2007); *Williams v. Lane*, 826 F.2d 654, 660 (7th Cir. 1987) (affirming grant of habeas relief where the state court had erroneously held that the claim was waived, explaining that the court was "at a loss to imagine . . . what state procedural ground the Illinois Appellate Court could possibly have invoked"); *Silverstein v. Henderson*, 706 F.2d 361, 368 (2d Cir. 1983) (explaining that "the state court denied collateral relief on the mistaken ground that the question of competence had already been fully litigated"); *cf. McMeans v. Brigano*, 228 F.3d 674, 679-80, 681-82 (6th Cir. 2000) (concluding that the state court had erroneously "ruled that appellate counsel had, in fact, raised a Confrontation Clause claim in [defendant's] direct appeal and that [the] claim had been rejected"). It is all the more important in that situation for the prosecution to give an accurate account of the procedural history on federal habeas review, lest the federal courts repeat the error and potentially eliminate any possibility of any court's fully addressing the merits of the claim.

B. The Prosecution Failed To Disclose Exculpatory Evidence Directly Related To Petitioner's Defense And To His Case For Leniency At Sentencing.

The state and federal courts' erroneous understanding of the procedural history of petitioner's *Brady* claim has had the unfortunate consequence of impeding the grant of relief on a meritorious claim. A review of the evidence withheld during petitioner's trial makes plain that the prosecution should have disclosed it, and that the prosecution's failure to do so undermines confidence in both the verdict of guilt and the capital sentence.

1. From the time of opening statements at trial, petitioner raised "only one" defense to the charges against him: that, while he had committed the conduct giving rise to the charges, he did so while in a drug-induced psychosis related to his post-traumatic stress from military service. Ct. App. J.A. 133; *see* Pet. Br. 2-4. Petitioner presented the testimony of a clinical psychologist and neuro-pharmacologist, who testified that petitioner suffered from a serious drug abuse disorder that had developed into a chronic amphetamine psychosis. *State v. Cone*, 665 S.W.2d 87, 92 (Tenn. 1984); Pet. Br. 3, 40. In closing arguments, petitioner's counsel told the jury that the "only one issue in this entire lawsuit" was whether petitioner was "sane under the law," and argued as to that issue that petitioner was "an addict out of control" with "no ability to reason." Ct. App. J.A. 133-34; *see* J.A. 112-13.

The prosecution strongly disputed petitioner's claim that he was addicted to drugs or under the in-

fluence of drugs at the time of the crimes. The officer who processed petitioner after his arrest, Sergeant Ralph Roby, testified that he saw no indication of petitioner's drug use. Pet. Br. 43; Pet. App. 36a. An FBI agent who interviewed petitioner after his arrest, Eugene Flynn, similarly testified that petitioner exhibited no sign of mental illness or drug addiction. Pet. Br. 44; Pet. App. 37a. And an acquaintance of petitioner, Irene Blankman, testified that she was with him one day after the murders and that he used no drugs in her presence and showed no sign of recent drug use. *See Bell v. Cone*, 535 U.S. 685, 705 (2002) (Stevens, J., dissenting); *Cone*, 665 S.W.2d at 91; Pet. Br. 45. The prosecutor argued to the jury that petitioner's claim that he was "a drug addict" was "balony," Pet. Br. 41, contended that the drugs and large amount of money found in petitioner's car suggested that petitioner was a "drug seller" rather than a drug user, J.A. 107, and asked the jury to focus on the testimony of the witnesses who "had the opportunity to hear from [petitioner or] who saw him in or around the time of the offense," which showed petitioner to be "a calm, cool professional robber" rather than in a drug-induced psychosis related to post-traumatic stress. Ct. App. J.A. 151-52; J.A. 112; *see* J.A. 113.

In subsequently arguing in the capital sentencing hearing that petitioner's life should be spared, petitioner's counsel referred the jury to the guilt-phase evidence and reiterated the defense position that petitioner was a "junkie and drug addict" and had a diminished mental state at the time of the crimes. Punishment and Sentencing Hearing Tr. 2117 (Apr. 23, 1982); *see* Pet. 4; *Bell*, 535 U.S. at 691 (majority

opinion), *id.* at 713 (Stevens, J., dissenting). The jury disagreed and imposed a sentence of death.

In affirming petitioner's capital sentence and conviction, the Tennessee Supreme Court emphasized the lack of evidence supporting petitioner's argument that he was acting under the influence of drugs at the time of the crimes. The court explained that "neither of the expert witnesses who testified on [petitioner's] behalf had ever seen or heard of him until a few weeks prior to the trial"; that their testimony had been "based purely upon his personal recitation to them of his history of military service and drug abuse"; that "[l]ay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to . . . his drug abuse"; and, in particular, that the three prosecution witnesses "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question." *Cone*, 665 S.W.2d at 90, 93.

2. During the proceedings on petitioner's second petition for state post-conviction relief, petitioner learned for the first time that the prosecution had failed to disclose evidence and information that directly supported his claim that he was a drug addict and was acting under the influence of drugs at the time of the crimes. That evidence included:

> a. An incident report containing the statements of witnesses who stated that petitioner "looked wild eyed" the day before the homicides. J.A. 50-51.
>
> b. A witness statement responding affirmatively to the question whether petitioner ap-

peared "to be drunk or high on anything" when he robbed a store two days before the murders, and stating: "Well he did, he acted real weird that is the reason I watched him." J.A. 48-49.

c. A police report describing petitioner as "looking about in a frenzied manner" and appearing "agitated" a few days after the killings. J.A. 53.

d. A supplemental report, made one day after the murders by a police officer investigating the crimes, stating that petitioner "was a heavy drug user." J.A. 26.

The prosecution also withheld additional evidence supporting petitioner's claim that he was a drug addict and rebutting the prosecution's argument that petitioner was a "drug seller" rather than a drug user—evidence that also could have been used to impeach the testimony of Sergeant Roby and Agent Flynn:

a. A law enforcement teletype system memo authorized by Sergeant Roby and dated August 12, 1980, which states that petitioner "is a heavy drug user"; two law enforcement teletype system memos authorized by Sergeant Roby and dated August 11, 1980, which describe petitioner as a "drug user"; and a statement made by petitioner's sister to Sergeant Roby on August 23, 1980, that petitioner had "severe psychological problems" and "needed to work on his drug problem." J.A. 55-59.

b. An FBI "Fugitive Index" form (FD-65), apparently authorized by Agent Flynn (Pet. 29), providing as "additional pertinent information" that petitioner is a "DRUG USER"; multiple teletypes issued by the FBI from August 12, 1980 to August 15, 1980, describing petitioner as a "drug user" and as a "heavy drug user"; and an FBI teletype dated August 13, 1980, stating that petitioner was found "in possession of 850 amphetamine pills" when previously in prison. J.A. 63-71.

Finally, the prosecution withheld information that could have been used to impeach the testimony of Ilene Blankman, who testified that she had seen petitioner one day after the murders and that he had no needle marks on his body and exhibited no indication of drug abuse:

a. Notes of a pretrial interview with Blankman in which she failed to reveal, as she later testified at trial, that petitioner had slept in her bed two days after the murders, that she had seen petitioner unclothed at that time, or that she had seen no needle marks on petitioner's arms. J.A. 72-73; *see* Pet. Br. 45.

b. Files indicating that Blankman was the only state witness to receive a thank-you letter and showing that she had had numerous contacts with the prosecution. J.A. 74-75; *see* Pet. Br. 45.

The prosecution should have disclosed the exculpatory and impeachment evidence to petitioner. As this Court has explained, "[t]here are three components of a true *Brady* violation: The evidence at is-

sue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Prejudice exists when the evidence withheld is "material either to guilt or to punishment," *Brady*, 373 U.S. at 87, and the "touchstone" of the materiality inquiry is whether disclosure of the evidence would have given rise to a "reasonable probability of a different result." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The question, in other words, is whether the evidence "undermine[s] confidence" in the verdict or sentence. *Id.* at 435.

A prosecutor's assessment of whether *Brady* requires disclosure of evidence can turn in certain situations on difficult judgments about materiality. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) (recognizing that the standard is "inevitably imprecise" and that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"), *rev'd on other grounds by United States v. Bagley*, 473 U.S. 667, 682 (1985). For precisely that reason, however, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* As the Court has recognized, "[t]his means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439. "This is as it should be," the Court has explained, given the prosecutor's status as "'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* (quoting *Berger v. United*

States, 295 U.S. 78, 88 (1935)). Accordingly, non-constitutional standards of conduct for prosecutors contemplate a broader range of disclosure than is compelled by the constitutional floor of *Brady*, "call[ing] generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Id.* at 437; *see* p. 2, *supra*.

The evidence in this case should have been disclosed under any standard. That evidence bore directly on the sole defense raised by petitioner at trial and on his argument for leniency in his capital sentencing hearing. The importance of the withheld evidence may be "best understood by taking the word of the prosecutor," as this Court did in *Kyles*, 514 U.S. at 444. The prosecutor's closing argument urged the jury to judge petitioner's mental state by "[w]hat . . . [the people] who saw [petitioner] in or around the time of offense had to say," Ct. App. J.A. 151-52—evidence that petitioner would have had if the prosecution had disclosed it. *See United States v. Udechukwu*, 11 F.3d 1101, 1105 (1st Cir. 1993) ("We have no doubt . . . that the prosecutor's persistent theme in closing argument suggesting the nonexistence of this information—and even the opposite of what the government knew—did fatally taint the trial."); *see also Bailey v. Rae*, 339 F.3d 1107, 1117 (9th Cir. 2003) (suppression was "all the more alarming given that the State . . . later showcased to the jury the defense's paucity of evidence" on the issue). The prosecutor's argument to that effect was reinforced by the Tennessee Supreme Court, which contrasted the lack of evidence introduced by petitioner concerning his condition at the time of the crimes with the testimony of the three witnesses for the

prosecution, who "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question." *Cone*, 665 S.W.2d at 93.

The evidentiary picture on that critical issue at trial and at sentencing would have looked far different had it included: (i) eyewitness statements that petitioner, around the time of the crimes, appeared "real weird" and on drugs, "wild-eyed," "frenzied" and "agitated," rebutting the prosecutor's characterization of petitioner as a "calm, cool professional robber"; (ii) multiple police bulletins contemporaneously describing petitioner as a "heavy drug user" or a "drug user," rebutting the prosecutor's argument that any suggestion of petitioner's drug addiction was "balony" and that he was a drug seller rather than a drug user; and (iii) substantial information with which to impeach the testimony of each of the prosecution's three witnesses about their impression of petitioner's condition soon after his crime spree.

It is unlikely, for instance, that Ilene Blankman's testimony would have stood up well to cross-examination had defense counsel known that she had been the subject of special attention from the State or that key parts of her testimony had come out for the first time at trial rather than in her initial interview by prosecutors. *See* Pet. Br. 45. Likewise, the testimony of Sergeant Roby and Agent Flynn suggesting that petitioner did not use drugs and was not "out of his mind" shortly after the crimes were committed likely would have been substantially undermined had defense counsel been armed with the information that both witnesses had authored or authorized several reports contempora-

neously describing petitioner as a "drug user" or "heavy drug user." *See id.* at 43-44. Such evidence, in conjunction with the withheld witness statements, would have given petitioner's expert witnesses more information from which to assess petitioner's mental state at the time he committed the acts alleged. *See id.* at 46. And the witness statements alone might have led petitioner to individuals who could have provided additional testimony to corroborate his defense at trial. *See id.* at 42.

In short, each of the documents suppressed by the prosecution in one way or another supported petitioner's claim that he committed the crimes in a state of drug-induced psychosis. The significance of the withheld evidence is particularly evident with respect to petitioner's capital sentencing proceeding. The conclusion of any one juror that petitioner's life should have been spared because he may have been acting under the influence of drugs and post-traumatic stress at the time of the crimes would have precluded imposition of a capital sentence.

For the reasons explained by petitioner, Pet. Br. 48-51, and as Judge Merritt understood below, Pet. App. 46a, the court of appeals conducted no meaningful assessment of the significance of the withheld evidence. Indeed, the court of appeals' perfunctory analysis of that evidence, *see* Pet. App. 25a-26a, only reinforces the need for a complete and adequate assessment of materiality by some court. The court of appeals asserted that the jurors "had already heard substantial direct evidence that [petitioner] was a 'drug user.'" *Id.* But as the prosecutor himself argued to the jury, and as the Tennessee Supreme Court reiterated in affirming petitioner's conviction

and sentence, there is a world of difference between testimony describing petitioner's condition and appearance at the time of the crimes, on one hand, and testimony based solely on his own statements years after the fact, on the other. The prosecution presented the former, and by failing to disclose evidence favorable to petitioner, left him to rely solely on the latter. In doing so, the prosecution breached its core obligations under *Brady*.

CONCLUSION

For the foregoing reasons, as well as those stated by petitioner, the Court should reverse the decision of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

[redacted]
105
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Supreme Court, U.S.
FILED
SEP 12 2008
OFFICE OF THE CLERK

No. 07-1114

IN THE
Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* VETERANS FOR AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Veterans for America is a nonprofit advocacy and humanitarian organization that unites the newest generation of military veterans with those from past wars to advance policies favorable to veterans and to elevate public discourse regarding the causes, conduct and, particularly, the consequences of war. Veterans for America has a direct interest in the questions presented in this case. Although the specific issues presented in the petition deal with the proper scope of federal post-conviction review, the substantive question ultimately at issue in this case is a matter of surpassing importance to Veterans for America – the debilitating and often tragic effects of post-traumatic stress disorder that so many of our nation's combat veterans suffer, and the relevance of that disorder to a proper assessment of their culpability in criminal cases.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than Veterans for America and their counsel made a monetary contribution to the preparation or submission of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a Vietnam veteran and recipient of the Bronze star, whose sole defense to murder and argument against the death penalty hinges on the debilitating effects of post-traumatic stress disorder (PTSD) brought on by his military service. Petitioner Cone argued at trial and at sentencing that he was mentally incapacitated by psychosis caused by drug addiction arising from combat-induced PTSD. A jury then convicted him of first-degree murder and sentenced him to death. Only later did it emerge that the prosecution had suppressed an array of exculpatory evidence that would have supported his defense and argument in mitigation. To date, no court has considered the substance of Petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner Cone thus stands to be executed without any court having weighed the mitigating impact of PTSD on his culpability, and ultimately, on whether he should be put to death.

Petitioner's brief explains with clarity the many ways in which the Sixth Circuit erred in holding that federal post-conviction review of Petitioner Cone's claim was procedurally barred. Veterans for America will not repeat or amplify the precedent supporting that argument. Instead, we respectfully submit this brief to ensure that the Court understands that Petitioner's *Brady* claim is a powerful one on the merits that deserves full and fair consideration.

As we will demonstrate below, the substance of the defense that Cone raised both to the charge of murder and to the State's request for death – that he should not be held fully culpable because he suffers from post-traumatic stress disorder brought on by his military service – is one that finds strong support in a well-developed body of empirical evidence, as well as decades of practical experience on the part of entities such as Veterans for America.

The sad but undeniable truth is that tens of thousands of this nation's veterans bear the emotional and psychological scars of their battlefield service to their country – with PTSD chief among their afflictions. Even worse, veterans suffering from PTSD often turn to substance abuse to deaden their symptoms, bringing on a vicious cycle of self-destructive behavior. Regrettably, violence is a frequent manifestation of PTSD in the veteran population, particularly among substance abusers. A just assessment of criminal culpability requires that the nature and effects of PTSD be taken into account.

That is particularly true in this case. In seeking to win a conviction and death sentence, the prosecution did not deny that PTSD, particularly as exacerbated by the type of serious substance abuse that it so often brings about, could theoretically preclude a finding of the necessary *mens rea* or justify a "reasoned moral response" that a death sentence would be disproportionately severe. *See generally Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Instead, the prosecution challenged Cone's assertion that he suffered from PTSD and, in

particular, that he was in a state of amphetamine psychosis at the time of the crime. *See* Pet'r's Br. at 40-48 (detailing trial evidence presented by Cone regarding his diagnosis of PTSD and substance dependence, along with the State's response). But the prosecution told the jury that Cone was not a drug user at all, much less a person suffering from a chronic addiction to powerful amphetamines that began during his service in Vietnam and deepened over time as a consequence of his PTSD.

Thus, it was particularly shocking when subsequent discovery revealed that prosecutors had suppressed exculpatory evidence that flatly contradicted the prosecution's trial strategy – evidence confirming that the authorities believed Cone to be not merely a "heavy drug user," but also a person who was generally dangerous and who appeared "frenzied" and "wild eyed." *See* Pet'r's Br. at 42. This body of concealed evidence is plainly material to the core issue of Cone's culpability. It is directly relevant to his principal defense to the charge of murder. It is equally relevant to the sentencers' assessment of whether Cone should have received the death penalty. The fact is that Cone's psychological make-up, his addiction to powerful amphetamines, and the criminal acts of which he was accused are all completely consistent with a diagnosis of PTSD, which is hardly surprising given Cone's traumatic combat experience in Vietnam.

As will be developed below, the PTSD-based defense that Cone sought to put forth at trial and at sentencing is well supported by a significant body of evidence. That defense should have received full and

fair consideration by the jury that convicted and sentenced him. The prosecution, however, deprived the jury of the opportunity to give appropriate consideration to Cone's defense by suppressing evidence that directly supported that defense and that squarely contradicted the prosecution's statements to the jury that Cone was not a drug user at all, much less one suffering from the debilitating effects of PTSD. Because this evidence is material under any reasonable reading of *Brady*, there is every reason to think that Cone would obtain relief were he given the opportunity to adjudicate his *Brady* claim. This Court should therefore reverse the decision below.

ARGUMENT

I. The Prevalence of Post-traumatic Stress Disorder, Often Combined With Substance Abuse, Is Strikingly High In Veterans.

As far back as the Trojan War, commentators have documented the depression, anger, and gloom that plague many soldiers long after they have returned from combat. *See* Jonathan Shay, *Learning About Combat Stress From Homer's Iliad*, 4 J. Traumatic Stress 561 (1991); *see also* Edgar Jones, *Historical Approaches to Post-Combat Disorders*, 361 Phil. Transactions of the Royal Soc'y of London Series B 533 (2006). Such combat trauma is not surprising when one considers that exposure to combat is one of the most intense stressors known to man. *See* Inst. of Med., *Gulf War and Health Vol. 6: Physiologic, Psychologic, and Psychosocial Effects of*

Deployment-Related Stress 31-35 (2008); *see also* Jones, *supra*, at 533.

Perceptions about the frequency and severity of symptoms prompted the United States to establish "the first military hospital for the insane in 1863." Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190/191 Mil. L. Rev. 67, 70 (Winter 2006/Spring 2007). Over 850,000 active-duty U.S. soldiers were admitted to military hospitals for neuropsychiatric care during World War II. Paul Starr, *Social Transformation of American Medicine* 344 (1982). By 1979, the government decided it was necessary to open ninety counseling centers across the nation to treat such symptoms among soldiers returning from Vietnam. Hayes, *supra*, at 71. And within the next two years, the number of treatment centers for Vietnam veterans more than doubled. Eric T. Dean, Jr., *Shook Over Hell: Post-Traumatic Stress, Vietnam, and the Civil War* 15 (1997).

The problem received sustained attention from the relevant professional communities in the 1980s, with the proliferation of studies on the psychological effects of combat on Veterans. *See generally* Inst. of Med., *Gulf War and Health*, *supra*. Such attention included the official diagnostic classification of the disorder in 1980, when the American Psychiatric Association listed PTSD in its *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-III").[2] Dean, *supra*, at 27, 42.

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[2] Thus, PTSD was a clinically recognized disorder at the time Cone was convicted in 1982. The disorder continues to be

Indeed, Congress was so concerned about the prevalence of PTSD after the Vietnam War that it commissioned the National Vietnam Veterans Readjustment Study for an investigation of "post-traumatic stress disorder and other psychological problems" among Vietnam veterans. *See* Veterans' Health Care Amendments of 1983, Pub. L. No. 98-160, 97 Stat. 993. Although many Vietnam veterans readjusted to civilian life without experiencing symptoms, the prevalence of PTSD among Vietnam veterans was, and still is, alarmingly high. The results of the study indicate that nearly a third of men and over a quarter of women who served in Vietnam experienced post-traumatic stress disorder upon returning home. Richard A. Kulka et al., *Trauma and the Vietnam War Generation: Report of Findings from the National Vietnam Veterans Readjustment Study* 52-53 (1990). Overall, 1.7 million Vietnam veterans experienced stress symptoms, often continuing for decades following their return from the battlefield. *Id.*

Post-traumatic stress disorder also is strikingly common among Veterans of more recent wars. At the request of Congress and the U.S. Department of Veteran Affairs, the National Institute of Medicine reviewed all published evidence on the impact of combat trauma on veterans of the 1991 Persian Gulf War and the current conflicts in Afghanistan and

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listed in the most recent version of the American Psychiatric Association's manual ("DSM-IV"), with the diagnostic criteria for assessing PTSD largely unchanged. *See* Inst. of Med., *Posttraumatic Stress Disorder: Diagnosis and Assessment* 14-16 (2006).

Iraq. *See* Inst. of Med., *Gulf War and Health, supra*, at xvii, 1-3. The study concluded that 16% of combat troops experience PTSD symptoms within a year after their return from the current war in Iraq. *Id.* at 79. Active duty soldiers returning from the current conflict in Afghanistan face similarly high rates of PTSD. *See, e.g.*, Karen H. Seal et al., *Brining the War Back Home*, 167 Archives of Internal Med. 476, 480 (2007). The prevalence of PTSD is even higher among reservists, with nearly a quarter experiencing PTSD after returning from Iraq. Charles S. Milliken et al., *Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning from the Iraq War*, 298 JAMA 2141, 2143 (2007). The current conflicts in Iraq and Afghanistan have swollen the ranks of veterans suffering from PTSD.

Although symptoms vary, PTSD clearly disrupts the lives of those afflicted with the condition. The disorder can "leave patients with an array of disabilities from mildly distressing to severely incapacitating." Inst. of Med., *Posttraumatic Stress Disorder: Diagnosis and Assessment* 13 (2006). Even years after they have returned from war zone, veterans can develop "an array of psychopathological symptoms – from intrusive recollections such as nightmares and flashbacks, to disoriented thinking, startle reactions, social numbing, depression, and anxiety." Dean, *supra*, at 91.

Petitioner Cone, like other veterans, has suffered a panoply of these symptoms. In particular, he has experienced nightmares and has "for some time . . . manifest[ed] flashbacks . . . perceiving himself to be

back in a combat situation." J.A. 86 (expert testimony of M. Jaremko). As a result of PTSD, Cone also has become emotionally and socially distanced from society, and consequently, from the values held in civil society. *See* J.A. 86 (expert testimony of M. Jaremko). Further, Cone has experienced a host of other stress-related symptoms, including "depression, nervousness, [and] sleep disorders." J.A. 86-87 (expert testimony of M. Jaremko). Accordingly, Cone was described at trial as "[r]estless and sometimes hollering . . . [a]bout flying bodies back and . . . having to help handle them and how terrible it was, and the condition the bodies were in at the time." Trial Tr. 1644 (testimony of V. Cone). In these respects, Petitioner Cone's experience reflects the impact PTSD can, and does, have on many of our nation's Veterans.

Veterans with PTSD commonly suffer from other disorders, including drinking or drug problems. *See* Paula P. Schnurr et al., *Research on Posttraumatic Stress Disorder: Epidemiology, Pathophysiology, and Assessment*, 58 JCLP/In Session: Psychology in Prac. 877, 880 (2002). The rate of substance abuse among persons with PTSD may be as high as 60-80%. Beverly Donovan & Edgardo Padin-Rivera, *Transcend: A Program for Treating PTSD and Substance Abuse in Vietnam Combat Veterans*, 8 Nat'l Ctr. for Post-Traumatic Stress Disorder Clinical Q. 51, 51 (Summer 1999). Based on a comprehensive review of such studies, the Institute of Medicine concluded that there is "suggestive evidence of an association between deployment to a

war zone and drug abuse." Inst. of Med., *Gulf War and Health*, *supra*, at 162-63.

The common explanation for this high occurrence of substance abuse is the drive to mask the symptoms and effects of PTSD. Many health care professionals believe that substance abuse among Veterans with PTSD is a "copying strategy" to "self-medicate or diminish the stress symptoms and feelings [of PTSD]." Kulka et al., *supra*, at 283 (reporting results of National Vietnam Veterans Readjustment Study). *See* Casey T. Taft, et al., *Post-traumatic Stress Disorder Symptoms, Physiological Reactivity, Alcohol Problems, and Aggression Among Military Veterans*, 116 J. Abnormal Psychol. 498, 499 (2007).

The impulse to self-medicate through substance abuse is especially high among those suffering from PTSD as a result of combat trauma. Describing a typical example of the phenomenon, professionals treating veteran-sufferers detailed, "[The patient] witnessed many atrocities during combat in Vietnam . . . . Upon returning home, [he] often felt depressed and fearful; he was continuously agitated and always searched for the slightest sign of harm. He turned to heroin to shut out the pain." Patrick M. Reilly et al., *Anger Management and PTSD: Engaging Substance Abuse Patients in Long-Term Treatment*, 6 Nat'l Ctr. for Post-Traumatic Stress Disorder Clinical Q. 68, 68 (Summer 1996). "As with many Vietnam-combat veterans, [the patient] avoided addressing traumatic incident by using drugs and alcohol." *Id.* This story reflects the experience of many: "According to the National Vietnam Veterans Readjustment Study,

Vietnam veterans with PTSD are six times more likely to abuse drugs compared to Vietnam veterans without PTSD." *Id.*

Cone's experience was typical. After he returned from Vietnam, "[Cone] continued to use drugs . . . as a self-way to self-medicate against the stress . . . from having been a victim of . . . combat trauma." J.A. 87 (testimony of M. Jaremko). This is hardly surprising, given his traumatic combat experience, which included handling and transporting corpses of fallen soldiers. *See* Trial Tr. 1644 (testimony of V. Cone). As a scholar of the Civil War observed, "perhaps the most horrific" feature of war occurs on the battlefield "after the firing has subsided," when soldiers face "[m]angled men, dead and dying." Dean, *supra*, at 66. Studies of recent wars have similarly concluded that "exposure to dead and wounded comrades" is one of the uniformly traumatic features of war. Inst. of Med., *Gulf War and Health*, *supra* at 32.

Often those suffering from PTSD enter a dangerously addictive cycle. They suffer the symptoms of their disease, and then treat those symptoms through substance abuse, which only exacerbates their distance from society and amplifies propensities towards depression, anger, and violence. The particular maladies at the heart of Mr. Cone's case, therefore, are far from "balon[e]y." Pet'r's Br. at 41-42 (citing J.A. 108). Rather, the compounded effects of PTSD and substance abuse, and their prevalence in war veterans, are well-documented and serious, and there is ample evidence that Petitioner Cone was afflicted with the disorder.

II. PTSD, Particularly When Compounded By Substance Abuse, Is Directly Linked To An Increased Risk of Violent Crime.

PTSD, particularly when combined with drug and alcohol abuse, is associated with an increased proclivity for anger and violence. Research has revealed that "PTSD and its symptoms appear to be related to serious expressive violence." James J. Collins & Susan L. Bailey, *Traumatic Stress Disorder and Violent Behavior*, 3 J. Traumatic Stress 203, 217 (1990). Studies consistently show that veterans with PTSD "evidence higher rates of violent outbursts and aggressive behavior than those without the disorder, and exhibit more hostility expression and poorer anger control." Casey T. Taft, *Aggression Among Combat Veterans: Relationships With Combat Exposure and Symptoms of Posttraumatic Stress Disorder, Dysphoria, and Anxiety*, 20 J. Traumatic Stress 135, 135 (2007).

As the National Center for PTSD has explained, "[t]rauma can be connected with anger in many ways. After a trauma people often feel that the situation was unfair or unjust. They can't comprehend why the event has happened and why it has happened to them. These thoughts can result in intense anger." Nat'l Ctr. for PTSD, *Fact Sheet: Common Reactions After Trauma*, *available at* http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_commonreactions.html (last visited Sept. 9, 2008). This anger can be linked to the PTSD symptom known as hyperarousal. *See* Kulka et al., *supra*, at 33, 45-48. Hyperarousal can cause irritability,

anger, and even rage. Nat'l Ctr. for PTSD, *Fact Sheet: War-Zone Related Stress Reactions: What Veterans Need to Know*, *available at* http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/war_veteran.html?opm=1&rr=rr126&srt=d&echorr=true (last visited Sept. 9, 2008).

Hyperarousal also can lead sufferers to feel "out of control." Raymond W. Novaco, *Anger Treatment and Its Special Challenges*, 6 Nat'l Ctr. for Post-Traumatic Stress Disorder Clinical Q. 56, 58 (Summer 1996). When it attains levels of intense arousal, it can be profoundly troubling to the person having the anger experience." *Id.* Not surprisingly, uncontrollable anger often causes snap reactions, leading to violence and criminal acts.

Substance abuse exacerbates these effects. *See* Taft, et al., *Posttraumatic Stress Disorder*, *supra*, at 504 ("[H]yperarousal symptoms were associated with a greater frequency of aggression through their relationship with alcohol problems"). PTSD limits an individual's ability to control their responses to anger stimuli, and drugs and alcohol further limit the individual's capacity to deal with feelings of anger. Thus, those suffering from a combination of PTSD and substance dependence are particularly prone to commit violent acts as a result of impulses that they cannot fully control.

This risk is also elevated when those suffering from PTSD exhibit psychotic symptoms. One study found that "as many as 35% of treatment seeking veterans with PTSD may also experience psychotic

symptoms that are distinct from PTSD-related perceptual disturbances (e.g., flashbacks, trauma-specific hallucinations, disassociation), and this population represents a group of trauma survivors with significant vulnerabilities." Madeline Uddo, Frederick Sautter, & Larry Pardue, *Treatment of PTSD with Psychotic Symptoms*, 8 Nat'l Ctr. for Post-Traumatic Stress Disorder Clinical Q. 14, 14 (Winter 1998). The ranks veterans suffering from psychotic symptoms may be even higher. A study of male veterans seeking inpatient treatment found that, "more than 75% of the participants [met] the criteria for at least one personality disorder." Andres R. Bollinger, et al., *Prevalence of Personality Disorders Among Combat Veterans with Posttraumatic Stress Disorder*, 13 J. Traumatic Stress 259, 263 (2000). "By comparison, personality disorders are estimated to occur in approximately 10-13% of the general population." *Id.* Certain personality disorders can cause a decreased ability to control anger and to conform one's behavior to societal demands for non-violent reactions to anger stimuli. Those suffering from these effects of PTSD – particularly when they are also inflicted with substance abuse disorders – are more likely than the general population to resort to violence as a coping mechanism.

The risk is particularly prevalent in those – like Cone – suffering from PTSD as a result of war. As one Army Captain explained about a fellow soldier who committed a murder after he returned home, in war, the soldier was taught to solve "very dangerous problems by using violence and the threat of violence

as his main tools. He was congratulated and given awards for these actions. This builds in a person the propensity to deal with life's problems through violence and the threat of violence." Deborah Sontag & Lizette Alvarez, *War Torn; Across America, Deadly Echoes of Foreign Battles,* N.Y. Times, Jan. 13, 2008 (quoting a letter from Capt. Benjamin D. Tiffner, a criminal defendant's former platoon leader, who was killed in Iraq in November 2007). An Army reservist and Iraq veteran who now works as a prosecutor in California similarly explained that in war "[y]ou are unleashing certain things in a human being we don't allow in civic society, and getting it all back in the box can be difficult for some people." *Id.* (quoting William C. Gentry).

This anecdotal evidence illustrates a problem of significant scope. "In the mid-1980s, [Vietnam] veterans made up a fifth of the nation's inmate population." Sontag & Alvarez, *War Torn, supra.* According to one study, fully a quarter of the male Vietnam Veterans with PTSD had engaged in 13 or more violent acts in the year directly preceding the study. *See* Hayes, 190/191 Mil. L. Rev. at 76-77. And "half had been arrested or incarcerated multiple times as an adult." *Id.* Exposure to combat and prevalence of PTSD is also associated with an increased risk of incarceration among Gulf War veterans. *See* Donald W. Black, *Incarceration and Veterans of the First Gulf War,* 170 Mil. Med. 612, 614 (2005). Recent analyses confirm that veterans continue to be more likely than other inmates to have committed violent offenses. *See* Christopher J. Mumola, Bureau of Justice Statistics Special Report,

Veterans in Prison or Jail 1, 5 (2000). The risk that military veterans suffering from PTSD will commit acts of violence is thus disturbingly high.

The risks of violence fall when afflicted individuals receive treatment. Unfortunately, many sufferers do not seek or receive proper care – particularly those whose PTSD is traceable to combat trauma. The National Vietnam Veterans Readjustment Study revealed that three quarters of male and nearly half of female Vietnam veterans suffering from PTSD do not receive any mental care. Kulka et al., *supra*, at 201.

Some have attributed the lack of proper care during the Vietnam era to a dearth of a general understanding about the issues faced by PTSD-suffering veterans. "[C]linical staff rarely, if ever, evaluate and/or document the presence of PTSD in substance use disordered patients . . . . It is likely that unchecked PTSD is associate with poorer treatment outcome . . . ." Bonnie S. Dansky et al., *Post-traumatic Stress Disorder and Substance Abuse: Use of Research in a Clinical Setting*, 10 J. Traumatic Stress 141, 145, 147 (1997). Others have linked the problems to the veterans themselves: "Many Vietnam combat veterans diagnosed with PTSD view[ed] the VA hospital as an extension of the military, an institution for which they hold contempt." Reilly et al., *supra*, at 68.

Although treatment and understanding have surely improved since the Vietnam era, the problem of improper care among veterans persists. A recent government report concluded that extant mental

health services are inadequate to meet the needs of veterans returning with post-traumatic stress syndrome from combat in Iraq and Afghanistan. Task Force on Mental Health, Dep't of Defense, *An Achievable Vision* (2007).

The lack of infrastructure is compounded by stigma associated with seeking treatment. In a recent three-part series detailing the prevalence of violent crimes among those returning from the Afghanistan and Iraq wars, the *New York Times* reported that many veterans suffering from PTSD worry that people, and particularly military colleagues, will view them as emotionally weak if they seek treatment for their disorder. Sontag & Alvarez, *War Torn*, *supra*. Few of these veterans receive the necessary care. Veterans forced to deal privately with the symptoms and devastating effects of PTSD are ill-equipped to overcome impulses of anger and violence. As noted, many turn to drugs and alcohol to self-medicate and to numb the feelings of anger and rage.

III. Evidence of PTSD and Related Substance Abuse Are Directly Relevant To Determining Whether a Defendant Formed the Requisite Intent to Commit a Crime and as Mitigating Evidence at Sentencing.

In cases where the defendant suffers from PTSD due to combat trauma, it is both reasonable and necessary for the trier of fact to consider whether the defendant's symptoms have affected his ability to manifest the specific intent required for conviction.

Thus, in a trial for first-degree murder, it is reasonable for the trier of fact to ask whether a defendant's PTSD-related symptoms of hyperarousal and/or psychosis, along with any evidence of substance abuse, render it unlikely that the defendant acted with the clear intent to kill the victim. Of course, the consideration of these factors does not require that a defendant escape culpability entirely. Rather, review of this evidence would merely go to whether the defendant formed a specific state of mind. If the court were convinced that his symptoms made it unlikely that the defendant formed the requisite *mens rea* for a specific intent crime, he might very well still be guilty of a lesser charge. *See* 2 Wharton's Criminal Law § 142 (Charles Torcia ed. 15th ed., updated Sept. 2007).

Further, evidence of PTSD and related substance abuse may also be useful and necessary in the sentencing phase of a trial. Indeed, California has passed a law mandating the consideration of such evidence, providing judges with statutory a basis to depart from presumptive prison sentences for criminal defendants who suffer from PTSD arising from their military service. *See* Cal. Penal Code § 1170.09 (providing that veterans be screened for PTSD and, if suitable, given treatment in lieu of jail or imprisonment). Courts have been compelled to consider such evidence even without a statutory mandate. For example, in *Masterson v. State*, 516 So. 2d 256, 258 (Fla. 1987), the Florida Supreme Court vacated a death sentence where a jury found a defendant Veteran's post-traumatic stress disorder and attendant drug abuse were mitigating factors.

See also Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (vacating a death sentence where evidence of defendant's drug and alcohol abuse supported theory that defendant's capacity to grasp the criminality of his conduct was diminished). These cases further illustrate that the trier of fact could reasonably determine that though the defendant is guilty of the crime, his disorders represent valid mitigating factors, leading to a downward departure in sentencing.

To ignore evidence of PTSD and related substance abuse in war veterans denies reality and betrays the safeguards in our criminal justice system. One military defense counsel has explained of PTSD-suffering veterans, "I think they should always receive some kind of consideration for the fact that their mind has been broken by war." Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Is Taking The Stand*, N.Y. Times, Jan. 27, 2008. A prosecutor trying a war veteran accused of a violent crime at home remarked, "I can't justify criminal activity. . . . But it would have been unjust to [the veteran defendant] and to society to throw out the circumstances that we as a society put him in." Deborah Sontag, *An Iraq Veteran's Descent; a Prosecutor's Choice*, N.Y. Times, Jan. 20, 2008. Taking it upon himself to consider the direct link between the violent symptoms of PTSD and the crime at hand, this prosecutor accepted a plea from the defendant for manslaughter, rather than murder. As such, he demonstrated a reasonable response to

the complex relationship between PTSD in war veterans and violent crimes.

In vivid contrast, the prosecution in this case sought to deny Cone the opportunity to make his case that one legacy of his service in Vietnam was PTSD, that this affliction had brought about a serious drug addiction, and that he had committed the criminal acts in question in a state of psychosis that could be traced to his afflictions. It is bad enough that the prosecution refused to disclose evidence in which officers of the State repeatedly described Cone in terms that would have directly supported his defense. But it is particularly shocking that, having suppressed this evidence, the prosecution would then try to shut down Cone's defense (both at trial and at sentencing) by falsely telling the jury that there was no evidence that Cone was a drug user at all, much less that he suffered from PTSD and a long term addiction that could have left him in the psychotic state he claimed to be in when the acts of which he was accused occurred.

Cone's ultimate substantive claim for relief under *Brady* is a powerful one, which deserves full and fair consideration, and vindication, in federal court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 12, 2008

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